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In the

Supreme Court of the United States

JOHN BARCLAY, CONSTANCE BARCLAY, ROYER BARCLAY, ALTHEA BARCLAY, JOHN AMOS, MARCIA J. BACON, RONALD BARTEL, MELVIN BERGEN, JOHN E. BOYLE, JONATHAN EHRLICH, FLORENCE EHRLICH, DONALD GRAUMANN, RUBEN KLIEWER, ALVIN KROUPA, BARBARA KROUPA, BURDETT LEDELL, LEE DALE MILLER, VERNON MINNS, FRANK A. MITCHELL, MID KANSAS COOPERATIVE ASSOCIATION, JOHN F. OPAT, ROBERT PRESNELL, JANET REGIER, SONJA REGIER, DON REINHARDT, JANICE REINHARDT, MARY J. RODGERS, DARRELL THOMPSON, ROBERT TURNER, GENEVA TURNQUIST, DONALD TURNQUIST, CLARKE E. WIEBE, and MARLENE J. WEBER,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Trails Act, a right-of-way easement for railroad purposes, which would otherwise be extinguished upon abandonment by the rail carrier, may be converted for recreational trail use. The conversion of the easement gives rise to a physical takings claim against the United States. Under 28 U.S.C. § 2401, a takings claim must be brought within six years. Is the statute of limitations triggered by the issuance of a federal agency order that serves the dual purpose of permitting the carrier to *either* convert the line to recreational use *or* outright abandon the line, or is it triggered at the time of actual conversion of the right of way to recreational use?

PARTIES TO THE PROCEEDING UNDER RULE 14.1(b)

As listed on the caption, Petitioners are John Barclay, Constance Barclay, Royer Barclay, Althea Barclay, John Amos, Marcia J. Bacon, Ronald Bartel, Melvin Bergen, John E. Boyle, Jonathan Ehrlich, Florence Ehrlich, Donald Graumann, Ruben Kliewer, Alvin Kroupa, Barbara Kroupa, Burdett Ledell, Lee Dale Miller, Vernon Minns, Frank A. Mitchell, Mid Kansas Cooperative Association, John F. Opat, Robert Presnell, Janet Regier, Sonja Regier, Don Reinhardt, Janice Reinhardt, Mary J. Rodgers, Darrell Thompson, Robert Turner, Geneva Turnquist, Donald Turnquist, Clarke E. Wiebe, and Marlene J. Weber.

Respondent is the United States.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Federal Circuit, from which this Petition seeks review, is reported at *Barclay v. United States*, 443 F.3d 1368 (Fed. Cir. 2006) (reproduced in the Appendix ("App") at App. 3a-25a). The Federal Circuit's denial of Petitioners' motion for reconsideration is unpublished at *Barclay v. United States*, 2006 U.S. App. LEXIS 24389 (Fed. Cir. 2006) (App. 1a-2a). The decision on which the *Barclay* court heavily relied and which squarely addressed the same issue presented here is reported at *Caldwell v. United States*, 391 F.3d 1226 (Fed. Cir. 2004) (App. 47a-70a). The decision of the United States District Court for Kansas is reported at *Barclay v. United States*, 351 F. Supp. 2d 1169 (D. Kan. 2004) (App. 26a-46a).

JURISIDICTION

The decision and judgment of the Federal Circuit was entered on April 11, 2006. The motion for reconsideration filed by the Petitioners was denied on September 12, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case implicates the statute of limitations for civil actions against the federal government, 28 U.S.C. § 2401 (App. 73a); part of the National Trails System Act, 16 U.S.C. § 1247(d) (App. 71a); the statutes governing abandonment of railroad rights of way, 49 U.S.C. §§ 10502, 10903, and 10905 (App. 74a-81a); and the regulations governing railroad abandonment and rails-to-trails conversion, 49 C.F.R. § 1152.29 (App. 82a-86a).

STATEMENT OF THE CASE AND FACTS

I. Overview

This case concerns a denial of just compensation for the physical taking of private property by the United States government. The United States Court of Appeals for the Federal Circuit has issued a bright-line rule which holds the statute of limitations period is triggered at the time of an initial federal agency order that sets into motion a series of events that may or may not result in a physical taking. *Caldwell v. United States*, 391 F.3d 1226, 1228 (Fed. Cir. 2004), *cert denied*, 126 S.Ct. 366 (2005) ("*Caldwell*") (App. 48a); *Barclay v. United States*, 443 F.3d 1368, 1370 (Fed. Cir. 2006) ("*Barclay*") (App. 4a). Under this rule, the six-year period may run before there is an actual physical occupation of private property that would give rise to the physical takings claim. Subject only to this Court's review, the Federal Circuit has exclusive appellate jurisdiction over the question presented here. *See* 28 U.S.C. § 1295.

Petitioners are thirty-three landowners whose properties constitute three former railroad rights of way in Kansas. The rights of way were originally obtained by the railroad companies as easements for railroad purposes only.

When a railroad chooses to fully abandon its line, the easement granted for railroad purpose is typically deemed abandoned because the easement is no longer used for the intended purpose. *Preseault v. I.C.C.*, 494 U.S. 1, 8-9, 16 (1990) ("*Preseault I*"). Upon abandonment of these easements, the servient estate becomes disencumbered of the

easement.[1] But under the National Trails System Act, 16 U.S.C. §§ 1241-1251 ("Trails Act"), abandoned railroad right-of-way easements may be converted to recreational trail use instead of permitting the easements to be extinguished. *See* 16 U.S.C. § 1247(d) (App. 71a-72a); *see also Preseault I*, 494 U.S. 1. This conversion places a new burden on private property and therefore gives rise to a takings claim for owners who, but for the conversion, would otherwise enjoy their disencumbered properties. *Preseault I*, 494 U.S. at 8-9; *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004) ("*Toews*"); *Hash v. United States*, 403 F.3d 1308, 1318 (Fed. Cir. 2005).

In the instant case, as in many other rails-to-trails conversion cases, the rights of way traversing the Petitioners' properties were sold by the railroad companies to trail managers for recreational trail use. Accordingly, Petitioners filed their suit under 28 U.S.C. § 1346(a)(2) (the "Little Tucker Act") to seek compensation for the physical occupation of their private properties by third parties, operating under the authorization of the Trails Act.

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[1] The term "reversionary" is sometimes used to denote the concept of the ownership of the vested right to the underlying real estate ("servient estate") that is burdened by easement. As explained in *Preseault v. United States*, however, the term "reversionary" is actually a misnomer when used in the context of easements because an abandoned easement does not "revert"–it is merely extinguished so that the land becomes unencumbered by any burden. 100 F.3d 1525, 1533 (Fed. Cir. 1996) ("*Preseault II*").

II. Statement of the Case and Facts

A. Statutory and Regulatory Framework

Since the early 1900's, available railroad trackage has declined steeply due to abandonment of use of rights of way. *Preseault I*, 494 U.S. at 6. To forestall the loss of railroad rights of way nationwide, Congress enacted the Trails Act. The Trails Act allows railroad corridors otherwise ripe for abandonment to be converted to recreational trails while preserving the corridor for potential future railroad use. *See* 16 U.S.C. § 1247(d); *Preseault I*, 494 U.S. at 6. This "rails-to-trails" conversion is known as "railbanking." *E.g. Toews v. United States*, 53 Fed. Cl. 58, 60 (2002). The railbanking process may be initiated when a railroad applies to the Surface Transportation Board ("STB")[2] for abandonment authority.

To abandon a right of way, the railroad must first obtain permission to do so from the STB. *See Preseault I*, 494 U.S. at 8. The railroad may opt to apply for abandonment in regular proceedings under 49 U.S.C. § 10903 (App.77a-80a), or as is applicable to the instant case, petition for exemption from the standard proceedings under 49 U.S.C. § 10502 (App. 74a-76a). Upon the publication of the railroad's application for abandonment, any qualified party may make a trail use or other public use request to the STB. 49 C.F.R.

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[2] The STB assumed authority over the federal railway system on January 1, 1996, as the successor agency to the Interstate Commerce Commission ("ICC"). 49 U.S.C. § 702. For ease of reference, the agencies shall be referred to as "STB" herein. The STB exercises exclusive and plenary jurisdiction over the abandonment of interstate railway lines. *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 320 (1981).

§§ 1152.28-.29 (App. 82a-86a); 49 U.S.C. § 10905 (App. 81a).[3]

If the railroad is willing to negotiate a trail use agreement with the trail sponsor, it shall inform the STB of its intention and the STB will then issue a Certificate of Interim Trail Use ("CITU") in standard proceedings or a Notice of Interim Trail Use ("NITU) in exemption proceedings. 49 C.F.R. § 1152.29(b)(2) & (d) (App. 83a-84a). The action at bar concerns the issuance of a NITU implicating the exemption proceedings. *Barclay*, 443 F.3d at 1371 (App. 5a).

A NITU merely provides a 180-day period for the railroad and the trail sponsor to negotiate a trail use agreement and permits the railroad to discontinue service, cancel tariffs, and salvage tracks and other equipment consistent with railbanking. 49 C.F.R. § 1152.29(b)(2) & (d) (App. 83a-84a). It does not require that the parties reach a trail use agreement. With good cause, the STB may extend the NITU for additional 180-day increments. *See Caldwell*, 391 F.3d at 1230.

The conditions recited in a typical NITU provide as follows:

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[3] After the STB determines that public necessity and conveniences allow a rail carrier to abandon its right of way, the STB, upon request, may consider whether the rail properties that are involved in the proposed abandonment are appropriate for use for public purpose and if so, prohibit the properties from being disposed of for a 180-day period after the effective date of the STB order authorizing abandonment. 49 U.S.C. § 10905 (App. 81a); 49 C.F.R. § 1152.28. This order is termed a "public use condition" and permits qualified parties to acquire the right of way for public use, including for example, lightrail use. *Id.*

> If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by the 180th day, [the rail carrier] may fully abandon the line.[4]

Thus, the STB describes the NITU as being "dual-purpose." *Rail Abandonments-Use of Rights of Way as Trails*, Ex Parte No. 274 (Sub-No. 13), 2 I.C.C.2d 591, 612 (1986) (Commission comment). On the one hand, the NITU provides for the railroad company and the trail sponsor to negotiate and ultimately consummate an agreement for trail use. 49 C.F.R. § 1152.29 (App. 82a-86a). If the rail carrier reaches an agreement with the trail sponsor, then on the effective date of the rails-to-trails conversion the trail sponsor assumes full responsibility for managing the right of way, for any legal liability arising out of the use of the right of way, and for the payment of all taxes. *Id.* § 1152.29(a). The effective date of conversion to trail use is generally at the time of "transfer, lease, donation, sale or otherwise" of the right of way. 16 U.S.C. § 1247(d) (App. 71a-72a); 2 I.C.C.2d at 608 ("If the right of way is acquired from the railroad, its liability ends with the severance of its property interest.").

On the other hand, the NITU also authorizes the railroad to abandon the line with no additional federal agency action required. 49 C.F.R. § 1152.29(b) & (d) (App. 83a-84a). Under the NITU, the rail carrier may discontinue operations,

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[4] *Union Pacific R.R. Co.-Abandonment Exemption-In McPherson County, KS (MCPherson Branch)*, STB Docket No. AB-33 (Sub-No. 89X), *NITU*, 1995 WL 569357, at *2 (ICC, Sept. 28, 1995) ("*UP NITU*").

salvage the track, cancel tariffs, and notify the STB it has consummated abandonment, thereby removing the right of way from the interstate rail network. *Id.* § 1152.29(e) (2) (App. 85a-86a). Once the rail carrier abandons its line pursuant to the abandonment authority, "the line is no longer part of the national transportation system," and "the [STB] jurisdiction terminates." *Preseault I*, 494 U.S. at 6. The burden on the servient estate is then extinguished and the landowner may enjoy the land as she pleases.

During the NITU proceedings, a carrier is still responsible for the right of way and may continue with rail operations, allowing overhead shipping traffic to continue undisturbed up until the point of actual trail conversion or abandonment of the line. *Caldwell*, 391 F.3d at 1236 (Newman, J., dissenting) (App. 66a); *see also UP Extension*, 1997 WL 138883.

Therefore, when a NITU is issued, several outcomes are possible: the carrier may choose to convert the right of way into recreational use; it may choose to fully abandon the line; or it may take neither of these two steps, and instead continue with its rail operations.

B. Application of the Statutes and Regulation

The rights of way traversing the Petitioners' properties have been converted into three recreational trails: Meadowlark Trail, Sunflower Trail, and Flint Hills Nature Trail. Each of these trails underwent a typical exemption proceeding wherein a NITU was initially issued, a series of extensions were granted, and eventually the recreational trail conversion transpired.

The Meadowlark Trail is located in McPherson County, Kansas. Union Pacific Railroad Company ("UP") was the last rail carrier to operate on the right of way. UP filed a notice of exemption with the STB on June 5, 1995.[5] The City of Lindsborg ("Lindsborg") requested a NITU and, alternatively, a concurrent 180-day public use condition under 49 U.S.C § 10905. In response, UP agreed to negotiate a trail use agreement but indicated that *it was still using the right of way for railroad purposes*.[6] The STB thus ordered a NITU and a public use condition, which was effective on September 28, 1995. A series of extensions followed, and finally on April 16, 1997, UP conveyed its interests in the right of way to CKC in a quitclaim deed for recreational trail use.[7]

The Sunflower trail is located in Marion and McPherson counties, Kansas. Central Kansas Railway, Limited ("CKR") was the last railroad to operate on the former right of way.

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[5] *UP NITU*, 1995 WL 569357, at *1.

[6] *Id.* Railroad operations might have lasted longer than this date, in that UP's planned discontinuance and salvage of the right-of-way "were subject to the NITU and any subsequent extensions." *Id.* at *3, n.15. This passage suggests that UP considered continuing its railroad operations on the line so long as extensions were granted to the NITU (since by definition no trail use agreement would yet have been reached). Accordingly, the right-of-way may have been put to railroad use up until the effective date of conversion of the right of way to a trail manager on April 16, 1997. *Cf. id.*

[7] *Union Pacific Railroad Company–Abandonment Exemption–In McPherson County, KS (McPherson Branch)*, Docket No. AB-33 (Sub-No. 89x). *UP Abandonment, Decision*, 1997 WL 138883, at *1 (STB, March 28, 1997) ("*UP Extension*").

CKR filed a request for exemption on February 22, 1996.[8] Shortly thereafter, Jennings & Co. ("Jennings") requested a NITU. The STB served the NITU on April 12, 1996, and, following a series of extensions and a re-issuance of a new NITU, on September 19, 1997, CKR quit-claimed its interests in the right of way to CKC, which subsequently substituted Jennings as the trail sponsor.[9]

The Flint Hills Nature Trail resulted from a consolidated proceeding on a right of way known as the "Hoisington Subdivision" of the Missouri Pacific Railroad Company ("MP").[10] Relevant to the instant case are the segments in Lyon and Morris counties ("Lyon County Segment" and "Morris County Segment").

The Lyon County segment was initially subject to both a NITU and public use condition in October 1994.[11] By

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[8] *Central Kansas Railway, LLC - Abandonment Exemption - in Marion and McPherson Counties, KS,* STB Docket No. AB-406 (Sub. No. 6X), 1996 WL 169774, *1, n.3 (STB, April 12, 1996) ("*CKR NITU*").

[9] *Central Kansas Railway Abandonment, Decision*, 1997 WL 160080 (STB, April 7, 1997) ("*CKR Extension*").

[10] *See Missouri Pacific R.R. - Abandonment Exemption - in Osage, Lyon and Morris Counties, KS,* STB Docket No. AB-3 (Sub-No.111X), *Missouri Pacific R.R. - Abandonment Exemption - in Miami, Franklin, and Osage Counties, KS,* STB Docket No. AB-3 (Sub-No. 115), *Missouri Pacific R.R. - Abandonment Exemption - in Morris and Dickinson Counties, KS,* STB Docket No. AB-3 (Sub-No. 121X), 1997 WL 414314 (STB, July 25, 1997) ("*Consolidated MP NITU*").

[11] *Consolidated MP NITU*, 1997 WL 414314, at *1.

October 26, 1995, the applicable NITU expired without MP and the sponsor, Rails to Trails Conservancy ("RTC"), effectuating the conversion. Shortly thereafter, however, MP informed the Board that the entire Hoisington Subdivision was conveyed to RTC under the Trails Act, effective on December 15, 1995."[12] Subsequently, RTC, the initial trail sponsor, was replaced with Seranata Farms School of Equestrian Arts ("Seranata"), which was ultimately substituted by the Kansas Horsemen Foundation ("KHF"). As to the Morris County Segment, the Board granted the NITU, which was effective March 31, 1995 and extended twice through to March 27, 1996.[13] Similarly, RTC was replaced with Seranata.

Subsequently, the STB consolidated the Morris Abandonment proceedings with the Lyon Abandonment proceedings, vacated the previous NITU and issued a third and last NITU, in which it authorized the conversion of the trail from Seranata to KHF, effective July 25, 1997.[14]

C. Procedures Below

On April 7, 2004, the Petitioners filed their suit against the United States (the "Government"). The Government moved to dismiss the case, arguing that the Petitioners' claims were time-barred because their claims had accrued more than six years prior to the filing of their complaint. Relying on

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[12] *Missouri Pacific Railroad–Abandonment Exemption–In Osage, Lyon and Morris Counties, KS*, Docket NO. AB-3 (Sub-No. 111X), 1996 WL 274065 (STB, May 24, 1996) ("*MP Lyon NITU*").

[13] *Consolidated MP NITU*, 1997 WL 414314 at *1, n.3.

[14] *See Consolidated MP NITU*, 1997 WL 414314.

Caldwell v. United States, 57 Fed. Cl. 193 (2003), which was then pending on appeal, the Government argued that the takings for each trail accrued when, subject to a NITU, the railroad companies reached agreement with the trail managers to convert the rights-of-way to trail use.

Appellant-Landowners responded that *Caldwell* was currently pending on appeal and that disposition of the Government's motion should await this Court's decision. *See Barclay v. United States*, 351 F. Supp. 2d 1169, 1174-75 (D. Kan. 2004) (App. 34a-36a) ("*Barclay I*"). In addition, the Landowners noted that the statute of limitations applicable to the claims on all three trails was tolled during the pendency of a putative class action case, *Swisher v. United States*, 189 F.R.D. 638 (D. Kan. 1999), to extend the limitations period and render the claims timely. *Barclay*, 351 F. Supp. at 1174 (App. 34a-35a). As such, the Landowners' claims were not time-barred even under the Government's theory of accrual. *Id.* at 1176-77 (App. 39a-40a). The Government countered that the *Swisher* case did not toll the limitations period here. *Id.*

While the Government's motion was pending, the Federal Circuit issued its decision in *Caldwell*. There, the Federal Circuit affirmed the Claims Court's decision but on different grounds, holding that the accrual date for a rails-to-trails takings case occurred when the STB issued one of the two NITUs in that case.[15] *Caldwell*, 391 F.3d at 1228 (App. 48a).

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[15] There were three NITUs issued altogether with the second NITU adding additional right-of-way to the first and the third NITU issued after a trail use agreement had been reached. *Caldwell*, 391 F.3d at 1231-32. The Court rejected the third and last NITU as a possible trigger of the accrual, and left it open that either of the first two NITUs triggered the accrual. *Id.* at 1235.

Which of the two NITUs triggered the accrual was immaterial to the decision because in either case, the Court held, the plaintiffs-appellants failed to file timely claims. *Id.* at 1235 (App. 63a).

Applying the Federal Circuit's decision in *Caldwell*, the District Court, in the instant case, granted the Government's motion and ruled that pursuant to 28 U.S.C. § 2401(a) (App. 73a), the action was dismissed for want of jurisdiction. *Barclay I*, 351 F. Supp. 2d at 1180 (App. 26a). The court held that the *Swisher* case did toll the statute of limitations. *Id.* at 1177 (App. 41a). But under *Caldwell*, which the District Court must apply, the court determined that the issuance of the first NITU on each of the three trails triggered the accrual for statute of limitations purposes such that the limitations period expired for each trail before the claims were filed. *Id.* at 1177-79 (App. 38a-41a).

Petitioners appealed. On appeal, the panel majority followed *Caldwell* and affirmed the trial court's decision that the Petitioners' claims were time-barred. *Barclay*, 443 F.3d at 1370 (App. 4a). Following that ruling, Petitioners requested a rehearing *en banc*, which was denied. *Barclay v. United States*, 2006 U.S. App. LEXIS 24389 (Fed. Cir. 2006) (App. 1a-2a).

D. The *Caldwell* and *Barclay* decisions

In the *Caldwell* and *Barclay* decisions, the Federal Circuit issued a "bright-line rule," *Barclay*, 443 F.3d at 1378 (App. 19a), that the issuance of a NITU triggers the running of the statute of limitations for all takings claims concerning a rails-to-trails conversion. Both of the cases were decided by the same panel with Judge Newman dissenting. In *Caldwell*, the Federal Circuit, for the first time, determined when the statute

of limitations accrues in a takings action brought pursuant to the Trails Act. *Caldwell*, 391 F.3d at 1228 (App. 48a). Under the majority holding, the bright-line rule states that a regulatory action, namely the issuance of a NITU, alone marks the date of accrual for a claim that *may* result in a physical taking. *Barclay*, 443 F.3d at 1370 (App. 4a). This is so despite the regulatory action being conditional, where the advent of a taking remains conjectural and hypothetical. As acknowledged by the majority panel, the issuance of a NITU could result in different outcomes, with only one of those outcomes resulting in the physical occupation of a plaintiff's property. *Caldwell*, 391 F.3d at 1228 (App. 61a). Where the railroad does not reach an agreement for trail use with the trail sponsor, the panel opined the issuance of a NITU could mark a "temporary taking." *Id.*

Judge Newman dissented, stating in *Caldwell* that "all authority is contrary to th[e panel majority's] position," App. 65a. In *Barclay*, Judge Newman reiterated her disagreement with the panel and reasoned that the accrual occurred only when the railroad sold the right-of-way interests to the trails group because, until that time, (1) the NITU could effect a reversion of interests to landowners instead of a taking, *Barclay*, 443 F.3d at 1378 (App. 21a); (2) the prospect of conversion to trail use that gives rise to a taking was hypothetical and therefore lacked "a legally recognizable harm," *id.* at 1378-79 (App. 21a-22a) (citation omitted); (3) the NITU was prospective and merely authorized the rail carrier to engage in negotiations for a possible conversion of the easement to recreational use, *id.* at 1379-80 (App. 23a); and (4) there was no physical occupation of the property by the trail manager but only a possibility that the occupation might occur, the claims were therefore unripe, and only at the time of the conversion of the easement had all events occurred

to fix the Government's liability as required under the Federal Circuit's well-settled rule. *Id.* at 1380-81 (App. 23a-24a).

GROUNDS FOR GRANTING THE WRIT

The *Caldwell-Barclay* bright-line rule–that a takings claim is triggered by a conditional agency action which may actually never result in any taking–violates this Court's precedent and implicates an important federal question to be decided by this Court. The bright-line rule will stand unless this Court grants this petition because, subject only to this Court's review, the Federal Circuit maintains exclusive jurisdiction over the matter. *See* 28 U.S.C. § 1295.

The rule effectively abrogates 28 U.S.C. § 2401 with respect to all rails-to-trails takings cases: It shortens the limitations period for all such claims, and in instances where a physical taking transpires more than six years after the service of a NITU, the rule cuts off those claims altogether. Thus, the disposition of the issue affects the fundamental property rights, not only of the Petitioners, but of many other landowners whose properties have been or will be affected by the operation of the Trails Act.There are at least 22 Trails Act takings cases pending and over 13,000 miles of abandoned rights of way that are subject to the Trails Act, with potentially 3,000 additional miles falling subject to the Trails Act each year.[16]

It is axiomatic that a limitations period for a federal taking of private property does not begin to run until "all events have

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[16] *See Preseault I*, 494 U.S. at 5; Rails-To-Trails Conservancy, *Frequently Asked Questions, available at* http://www.railtrails.org/whatwedo/building/faq.asp.

occurred to fix the Government's alleged liability, entitling the claimant to demand payment and sue here for his money." *Martinez v. United States*, 333 F.3d 1295, 1303 (Fed. Cir. 2003) (citation omitted).[17] Under the *Caldwell-Barclay* rule, however, the limitations period is triggered by an initial agency action, when the prospect of an *actual* rails-to-trails conversion–i.e., the physical taking–is conjectural and hypothetical. *See Goos v. I.C.C.*, 911 F.2d 1283, 1293 (8th Cir. 1990) (describing the conversion as a mere "possibility").

This Court has repeatedly recognized that principles of fairness and judicial efficiency guide the analysis when considering cases presenting limitations issues. *Cf. Lampf v. Gilbertson*, 501 U.S. 350, 357 (1991) ("limitations periods in general promote important considerations of fairness"); *Board of Regents v. Tomanio*, 446 U.S. 478, 487-88 (1980) (statutes of limitations "have long been respected as fundamental to a well-ordered judicial system"). The *Caldwell-Barclay* rule is repugnant to those principles and for the reasons enumerated below, the Court should grant the writ.

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[17] *See also Boling v. United States*, 220 F.3d 1365, 1370 (Fed. Cir. 2000) (same); *Seldovia Native Assoc., Inc. v. United States*, 144 F.3d 769 (Fed. Cir. 1998) (same); *Fallini v. United States*, 56 F.3d 1378, 1380 (Fed. Cir. 1995) (same); *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988) (same); *Japanese War Notes Claimants Ass'n v. United States*, 373 F.2d 356, 358 (1966) (same), *cert. denied*, 389 U.S. 971 (1967); *cf. Creppel v. United States*, 41 F.3d 627 (Fed. Cir. 1994) (*citing Japanese War Notes*).

I. Unless a railroad easement is converted to recreational trail use pursuant to a NITU, a landowner has no justiciable claim to trigger the statute of limitations.

It is well-settled that "[a] limitations period ordinarily does not begin to run until the plaintiff has a 'complete and present cause of action.'" *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 195 (citation omitted); *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 418 (2005) (same). "[A] cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief," unless Congress has provided otherwise. *Bay Area Laundry*, 522 U.S. at 201 (citation omitted). This Court has long recognized that "limitations principles should generally apply to the Government in the same way that they apply to private parties." *Franconia Assocs. v. United States*, 536 U.S. 129, 145 (2002).

The earliest opportunity for filing suit "is that moment when the plaintiff has suffered a legally recognizable harm at the hands of the defendant such as the time of contract breach or the commission of a tortious wrong." *Hair v. United States*, 350 F.3d 1253, 1260 (Fed. Cir. 2003). In a takings claim against the United States Government, the well-settled rule is expressed as follows: a taking accrues no sooner than when "all events have occurred to fix the Government's alleged liability. . ." *Martinez*, 333 F.3d at 1303.

If the construction of a statute of limitations allows a cause of action to accrue at one time for the purpose of calculating when the statute of limitations begins to run, "but at another time for the purpose of bringing suit," the courts should reject "such an *odd* result" unless Congress has specifically provided otherwise. *See Reiter v. Cooper*, 507 U.S. 258, 267

(1993) (emphasis added). It is "*highly doubtful*" that Congress would ever intend to create such situation. *See Johnson v. United States*, 544 U.S. 295, 305 (2005) (emphasis added). Contrary to this Court's well-established principles, the *Caldwell-Barclay* rule creates just "such an *odd* result."

A. A rails-to-trails takings claim accrues at the time of the conversion from railroad use to recreational trail use.

Here, Petitioners sued for compensation for the conversion of the railroad rights of way to recreational trails. *Barclay*, 443 F.3d at 1370 (App. 4a). The basis for filing the suit was that, due to the rails-to-trails conversion authorized by the Government, the trail use imposes a new burden on the Petitioners' lands, and therefore prevents them from enjoying state-defined reversionary interests, which constitutes a taking. *See Preseault I*, 494 U.S. at 16; *Hash v. United States*, 403 F.3d 1308, 1312 (Fed. Cir. 2005); *Preseault II*, 100 F.3d at 1533; *Toews*, 376 F.3d at 1376. The proper time for the Petitioners to have filed their suit was simply the point when the physical taking occurred, as to which the precedent of this Court provides well-settled principles. *See id.*

It is well-established that "physical takings by governmental bodies that may entitle a landowner to sue for compensation . . . occur with the occupation of the property." *United States v. Clarke*, 445 U.S. 253, 256 (1980). "To accomplish a taking by seizure . . . [the governmental entity] need only occupy the land in question." *Id.* at 257.

In *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), this Court held that a taking would occur if the Government appropriated a public easement. In so ruling, this Court ruled that in such a case, a "permanent physical

occupation" of the underlying property has occurred "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed." *Nollan*, 483 U.S. at 832; *Preseault I*, 494 U.S. at 24 (O'Connor, J., concurring).

Similarly, in a rails-to-trails case as here, a taking will occur when, under the authorization of the federal agency order, the railroad and the trail sponsor convert an original railway easement into recreational trail use. In such a case, the "permanent physical occupation" of the lands occurs at the time when the rail carrier conveys the easement interest to the trail sponsor and confers upon the latter "a permanent and continuous right," *see id.*, to use the rights of way. *See Hash*, 403 F.3d at 1318 ("upon conversion of this land to a public trail, these owners' property interests were taken for public use, in accordance with the principles set forth in the Preseault cases."); *Preseault II*, 100 F.3d at 1533; *Toews*, 376 F.3d at 1376.

The effective date of conversion to trail use is generally at the time of "transfer, lease, donation, sale or otherwise" of the right of way. 16 U.S.C. § 1247(d); 2 I.C.C.2d at 608. Only at that point do the landowners suffer a "legally recognizable harm"; i.e., only at that point is the railroad easement extinguished and a new burden of recreational trail use imposed on private property. *See Toews*, 376 F.3d at 1376; *Hash*, 403 F.3d at 1318; *see also Preseault I*, 494 U.S. at 20-21. In contrast, the issuance of a "dual-purpose" NITU, 2 I.C.C.2d at 612, cannot mark the point when the landowner suffers harm because the NITU merely marks the beginning point of a trail use negotiation, which may or may not result in a rails-to-trails conversion. *See Goos*, 911 F.2d at 1293. Indeed, the NITU authorizes *both* the recreational trail conversion *and the full abandonment of the line*. *Id.*

B. The NITU is dual purpose in character and may lead to either rails-to-trails conversion or to the extinguishment of the easement.

The NITU does not require that the railroad consummate an agreement for rails-to-trails conversion. 49 C.F.R. § 1152.29 (d) & (e)(2). It merely authorizes the rail carrier and the trail sponsor to negotiate a recreational trail use agreement. A typical NITU reads as follows:

> If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use *may* be implemented. If no agreement is reached by the 180th day, [the rail carrier] *may* fully abandon the line.[18]

As noted by the United States Court of Appeals for the Eighth Circuit,

> issuance of an NITU . . . is not only incidental to the abandonment, but also is itself not a guarantee of eventual trail use. The NITU . . . serves only to provide an opportunity for the railroad and prospective trail users to negotiate an agreement; thus, when [the STB] issues a NITU . . . there is only a *possibility* that a particular right-of-way actually will be used as a recreational trail.

Goos, 911 F.2d at 1293 (internal quotations omitted).

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[18] *UP NITU* , 1995 WL 569357, at *2 (emphasis added).

Accordingly, if and only if the rail carrier executes a trail use agreement with the trail sponsor is the right of way converted to recreational use. But if no agreement is reached, the NITU authorizes the full abandonment of the line should the railroad so choose. If the rail carrier opts to fully abandon its line pursuant to the NITU, any right-of-way easements are extinguished, freeing the servient estate from its previous burden. As such, a NITU serves as the regulatory means by which a railroad may fully abandon a line and extinguish all easements that had burdened the landowners' properties.

Moreover, during the pendency of a NITU and prior to the consummation of a trail use agreement, if any, the rail carrier not only continues as owner of the right of way, but retains "all of the benefits and obligations of ownership, including the right to exclude, the obligation to pay taxes, and liability for injury and liens." *Caldwell*, 391 F.3d at 1236 (Newman, J., dissenting) (App. 66a).

Also, the right of way *may still be in use* for overhead traffic by the railroad company itself as was the case on one of the lines here. *See UP NITU,* 1995 WL 569357, at *1. Accordingly, during the pendency of a NITU, the railroad's liability and responsibilities, and perhaps even its rail operations, are ongoing.

C. A hypothetical taking is an insufficient ground to bring a claim and cannot trigger the statute of limitations.

The advent of a trail conversion under a NITU is hypothetical and conjectural. *Goos*, 911 F.2d at 1293. A hypothetical, conjectural potential for a taking is insufficient to establish a justiciable claim. The doctrine of justiciability first and foremost requires the plaintiff to have standing to bring the claim.

This Court has long held that in order to have standing to raise a claim, the plaintiff must have suffered an "injury in fact"–an invasion of a legally protected interest which is (a) "concrete and particularized," and (b) "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted); *see also Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

But upon the issuance of the NITU, there is only a "hope," *Caldwell*, 391 F.3d at 1234 (Newman, J., dissenting) (App. 67a), or "possibility," *Goos*, 911 F.2d at 1293, that the railroad rights of way may be converted to recreational trails. Until there is a trail conversion, there is an equal possibility under the NITU that the right of way will be abandoned. Thus, without conversion to trails use, landowners have only a *hypothetical* harm and therefore cannot initiate a takings claim for a rails-to-trails conversion under the Trails Act. *See id.*[19]

Under the *Caldwell-Barclay* rule, the six-year limitations period is thus shortened because it begins to run long before the occurrence of the actual rails-to-trails conversion giving rise to the taking. Further, a NITU may mark the start of a period lasting six or more years, during which time *no* trail use conversion is consummated. *See Southern Pac. Transp. Co.–Abandonment Exemption–Wendel-Alturas Line in Modoc and Lassen Counties, CA, Decision*, Docket No. AB-12 (Sub-No. 184X), 2004 WL 1941838 (STB, Service Sept. 1,

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[19] *See also Presault II*, 100 F.3d at 1550-52 (holding liability for a taking is based on the change in use of easement from railroad use to recreational trail); *Toews*, 376 F.3d at 1376 (same); *Hash*, 403 F.3d at 1318 (same).

2004) (extending NITU negotiating period until September 3, 2005–more than nine years after the first NITU was served and without conversion to trail use); *CSX Transp., Inc.–Abandonment Exemption–In Franklin County, PA, Decision*, Docket No. AB-55 (Sub-No. 568X), 2005 WL 189881 (STB, Service Jan. 28, 2005) (extending authorization to abandon line until September 27, 2005, and trail negotiating period until July 29, 2005–more than six years after the first NITU was served and without consummation of trail use). In those cases, the six-year limitations period already expired before the landowner could bring a justiciable takings claim.

The Federal Circuit, therefore, erroneously identified the date of issuance of the NITU as the time when the takings claim accrues for the purpose of statute of limitations.

II. The *Caldwell-Barclay* rule that a NITU fixes the date of the Government's liability because it *may* mark a "temporary taking" conflicts with controlling regulatory and physical takings jurisprudence.

To substantiate the bright-line rule that a rails-to-trails conversion takings claim accrues when a NITU is issued–even when there is no trail conversion as of yet or ever–the *Caldwell-Barclay* majority ruled that the agency action alone may constitute a "temporary taking." *Caldwell*, 391 F.3d at 1237 (App. 61a). This can be so because, the court reasoned, by issuance of the NITU, abandonment of the right of way is "suspended" and the reversionary interest is therefore temporarily blocked. *Id.*; *Barclay*, 443 F.3d at 1373 (App. 9a-10a). As such, the decision sets a new rule that a taking claim accrues when there is a pure regulatory action that authorizes only the *possibility* of a physical occupation of

property. *Id.* This ruling contradicts takings jurisprudence from this Court and the Federal Circuit.

A. A NITU alone, without the trails conversion, fails applicable "temporary taking" tests.

A temporary regulatory taking may occur if (1) there is "extraordinary delay in [the] governmental decision making," or (2) "what would otherwise be a permanent taking is temporally cut short." *Seiber v. United States*, 364 F.3d 1356, 1364 (Fed. Cir. 2004) (citation omitted). These two rules serve as independent grounds for temporary takings claims. *Id.* Thus, for the *Caldwell-Barclay* rule to satisfy controlling precedent, one of these "temporary taking" rules must in theory be applicable.

1. The NITU regulatory process does not satisfy the "extraordinary delay" test under any measure.

The "extraordinary delay" requirement presupposes, of course, that the elements to establish a taking under the Court's rules are met. The *Caldwell-Barclay* rule states that all Trails Act takings claims shall be brought within six years from the initial NITU. *Caldwell* 391 F.3d at 1228 (App. 48a); *Barclay*, 443 F.3d at 1370 (App. 4a). Thus, under the *Caldwell-Barclay* rule, the series of typical NITU extensions over a span of less than six years must somehow constitute "extraordinary delay" to satisfy this rule.

But a NITU causes no material "delay" under any reasonable meaning. Prior to the passage of the Trails Act and its precursor, the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), 49 U.S.C. § 10906, railroads were subject to onerous regulatory proceedings that created substantial delays in the ability of the railroads to

abandon and liquidate unwanted rights of way. *Hayfield N. R.R. Co. v. Chicago and N.W. Transp. Co.*, 467 U.S. 622, 628-29 (1984). The 4-R Act and Trails Act effectively replaced the longer, more arduous process to which railroads had previously been subjected, and allow for a relatively expedited process by which a right of way may be fully abandoned. *See id.* Accordingly and by comparison, therefore, the Trails Act provides for a relatively efficient, "routine government process," *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 335 (2002), by which a railroad may abandon its line. The Court has previously explained the issue as follows:

> A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking. Such an important change in the law should be the product of legislative rulemaking rather than adjudication.

Id. As such, a rule that a NITU creates an actionable delay for "blocking" a vested right to abandonment, *Caldwell*, 391 F.3d at 1233, 1235, is in error. It is inconceivable that any six-year delay can serve as a basis for a temporary takings claim because under no circumstances can this relatively efficient, "routine government process," *Tahoe-Sierra*, 535 U.S. at 335, constitute extraordinary delay. *See id.*

2. Under a NITU there is no taking to be "cut short" under the meaning of the second test.

Nor can there a "temporary taking" under the theory that a permanent taking has been "cut short" if the issuance of a NITU leads to the abandonment of the right of way easement.

See Caldwell, 391 F.3d at 1228 (App. 48a); *Barclay*, 443 F.3d at 1370 (App. 4a). This rule too, presupposes there *was* a taking in the first instance that had been "cut short." Under this test, a temporary taking may result "when a court invalidates a regulation after the taking has already occurred" or "when the government elects to discontinue regulations after a taking has occurred." *Wyatt v. United States*, 271 F.3d 1090, 1097 n.6 (Fed. Cir. 2001) (citations omitted). A temporary taking may also occur when "the government denies a permit and at some later point reconsiders the earlier denial and grants a permit (or revokes the permitting requirement)." *Seiber*, 364 F.3d at 1364 (citation and brackets omitted). Under any of these examples, an otherwise permanent taking must exist in the first place. As the Federal Circuit held, "the essential element . . . is a finite start and end to the taking." *Wyatt*, 271 F.3d at 1097 n.6. But with a NITU alone, there has been no finite start to a taking in the first instance.

Under regulatory taking law, a taking is not ripe or complete until the regulatory agency "has reached a final decision regarding the application of the regulations to the property at issue." *Stearns Co. v. United States*, 396 F.3d 1354, 1358 (citing *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985)). In other words, the finality requirement mandates "that there has been an injury-in-fact" before there is a regulatory taking. *Cienega Gardens v. United States*, 265 F.3d 1237, 1245 (Fed. Cir. 2001) (citing *Williamson* and referring to the finality rule). At the time a NITU is issued, however, there is no "injury-in-fact," since the NITU is merely an agency action concerning the disposition of the carrier's line that can result in *either* recreational use *or* abandonment of the easement. As such, a NITU cannot

satisfy the test that an otherwise permanent taking was cut short. *See id.*

The issuance of a NITU can not constitute a temporary taking under any applicable test. Without a permanent taking in existence in the first place, there cannot be a temporary taking.

B. The *Caldwell* bright-line rule turns on an impermissible mixing of regulatory and physical takings analysis.

To arrive at the original ruling that a temporary taking may occur, the panel majority in *Caldwell* relied primarily upon regulatory takings cases and one physical takings case, *United States v. Dow*, 357 U.S. 17 (1958). *See Caldwell*, 391 F.3d at 1234; 1234 n.8. In so doing, the majority conflated regulatory takings with physical takings jurisprudence. The *Barclay* panel adopted the same line of reasoning in affirming the rule. *Barclay*, 443 F.3d at 1373 (App. 9a-10a).

This Court, however, has repeatedly admonished courts to observe the distinctions between physical and regulatory takings jurisprudence. In *Tahoe-Sierra*, the Court explained the importance of keeping the two analyses separate:

> This longstanding distinction between [physical] acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the

> evaluation of a claim that there has been a "regulatory taking," and vice versa.

535 U.S. at 322-23; *see also Preseault II*, 100 F.3d at 1540 ("As the Supreme Court makes clear, these two quite different situations call for quite different analyses.").

The Court's admonishment not to confuse the two takings paradigms should apply squarely to questions concerning *accrual* of a takings claim. This Court's discussions concerning physical takings cases support no other conclusion and the rule has been stated generally by the Court itself.

In *Clarke*, the Court considered whether the physical appropriation of allotted Indian trust lands pursuant to a condemnation statute, but without the initiation of condemnation proceedings, constituted permissible *per se* physical takings under the rubric of "inverse condemnation" theories. 445 U.S. at 256-58. The Court concluded the taking was not authorized and based the decision in part on the question of *when a physical taking by invasion can be deemed to accrue*:

> When a taking occurs by physical invasion, on the other hand, the usual rule is that *the time of the invasion* constitutes the act of taking, and "[i]t is that event which gives rise to the claim for compensation *and fixes the date* as of which the land is to be valued."

Id. at 258 (quoting *Dow*, 357 U.S. at 21) (emphases added); *cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) ("'the character of the government action' not only is an important factor in resolving whether the action works a taking *but also is determinative*") (emphasis added);

Nollan, 483 U.S. at 832 ("'a permanent physical occupation' [] occur[s], for purposes of th[e *Loretto*] rule, where individuals are given a permanent and continuous right to pass to and fro . . .").

Physical takings doctrine, and not regulatory takings jurisprudence, applies in analyzing liability in a rails-to-trails case. *Preseault II*, 100 F.3d at 1540 (holding the taking was physical and rejecting the government's theories of liability under any regulatory takings jurisprudence: "[p]lacing restraints on an owner's use of her property invokes the regulatory takings issue, rather than the question of the Government's physical occupation of private property, and both factually and legally raises significantly different issues."); *cf.*,*Loretto*, 458 U.S. at 426; *Nollan*, 483 U.S. at 832; *Tahoe-Sierra*, 535 U.S. at 322-23.

In any rails-to-trails case, the property is not physically appropriated by the Government, of course, but by a trail manager acting pursuant to the Government's authority. *E.g.*, *Preseault II*, 100 F.3d at 1551. The earliest a trail manager acquires the right to physically occupy a right of way and invite the public to pass to and fro is when the railroad transfers its interests to the manager pursuant to a NITU. 16 U.S.C. § 1247(d). Until that transfer, the railroad, who has typically owned the corridor spanning centuries, continues as the sole owner and occupier of the right of way. *See* 2 I.C.C.2d at 608. The NITU affords no more rights to the trail manager and the public to occupy the right of way than they had prior to its issuance. *Cf. id.*

Until the time of the physical occupation, there can be no permanent or "temporary" taking in a rails-to-trails case upon the issuance of a NITU as the Federal Circuit has held.

CONCLUSION

For the foregoing reasons, the Court should grant the petition to resolve the important question of whether a limitations period can be triggered before there is a justiciable claim.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2005-1255

[Filed September 12, 2006]

JOHN BARCLAY, CONSTANCE BARCLAY,	)
ROYER BARCLAY, ALTHEA BARCLAY,	)
JOHN AMOS, MARCIA J. BACON,	)
RONALD J. BARTEL, MELVIN BERGEN,	)
JOHN E. BOYLE, JONATHAN EHRLICH,	)
FLORENCE EHRLICH, DONALD GRAUMANN,	)
RUBEN KLIEWER, ALVIN KROUPA,	)
BARBARA KROUPA, BURDETT LEDELL,	)
LEE DALE MILLER, VERNON MINNS,	)
FRANK A. MITCHELL, MID KANSAS	)
COOPERATIVE ASSOCIATION,	)
JOHN F. OPAT, ROBERT PRESNELL,	)
JANET REGIER, SONJA REGIER,	)
DON REINHARDT, JANICE REINHARDT,	)
MARY J. RODGERS, DARRELL THOMPSON,	)
ROBERT TURNER, GENEVA TURNQUIST,	)
DONALD TURNQUIST, CLARK E. WIEBE,	)
and MARLENE J. WEBER,	)
Plaintiffs-Appellants,	)
	)
v.	)
	)

UNITED STATES,)
Defendant-Appellee.)
)

Before MICHEL, Chief Judge, NEWMAN, MAYER, LOURIE, RADER, SCHALL, BRYSON, GAJARSA, LINN, DYK, and PROST, Circuit Judges. NEWMAN, Circuit Judge, would rehear the appeal en banc.

ON PETITION FOR REHEARING *EN BANC*
ORDER

A petition for rehearing *en banc* was filed by the Appellants, and a response thereto was invited by the court and filed by the Appellee. The matter was referred first as petition for panel rehearing to the panel that heard the appeal, and thereafter the petition for rehearing *en banc* and response were referred to the circuit judges who are authorized to request a poll whether to rehear the appeal *en banc*. A poll was requested, taken, and failed.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The petition for rehearing is denied.

(2) The petition for rehearing *en banc* is denied.

(3) The mandate of the court will issue on September 19, 2006.

NEWMAN, Circuit Judge, would rehear the appeal *en banc*.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2005-1255

[Filed April 11, 2006]

JOHN BARCLAY, CONSTANCE BARCLAY,)
ROYER BARCLAY, ALTHEA BARCLAY,)
JOHN AMOS, MARCIA J. BACON,)
RONALD J. BARTEL, MELVIN BERGEN,)
JOHN E. BOYLE, JONATHAN EHRLICH,)
FLORENCE EHRLICH, DONALD GRAUMANN,)
RUBEN KLIEWER, ALVIN KROUPA,)
BARBARA KROUPA, BURDETT LEDELL,)
LEE DALE MILLER, VERNON MINNS,)
FRANK A. MITCHELL, MID KANSAS)
COOPERATIVE ASSOCIATION,)
JOHN F. OPAT, ROBERT PRESNELL,)
JANET REGIER, SONJA REGIER,)
DON REINHARDT, JANICE REINHARDT,)
MARY J. RODGERS, DARRELL THOMPSON,)
ROBERT TURNER, GENEVA TURNQUIST,)
DONALD TURNQUIST, CLARK E. WIEBE,)
and MARLENE J. WEBER,)
Plaintiffs-Appellants,)
)
v.)
)

UNITED STATES,)
Defendant-Appellee.)
)

On Appeal From
United States District Court for the District of Kansas
Senior Judge Wesley E. Brown

Before NEWMAN, DYK, and PROST, Circuit Judges. Opinion for the court filed by Circuit Judge DYK. Dissenting opinion filed by Circuit Judge NEWMAN.

OPINION

The United States District Court for the District of Kansas and the Court of Federal Claims dismissed several landowners' Fifth Amendment takings claims challenging the operation of the National Trail Systems Act (the "Trails Act"), 16 U.S.C. § 1247(d). *Barclay, et al. v. United States*, 351 F. Supp. 2d 1169 (D. Kan. 2004); *Renewal Body Works, Inc. v. United States*, 64 Fed. Cl. 609 (2005). Applying our decision in *Caldwell v. United States*, 391 F.3d 1226 (Fed. Cir. 2004), *cert. denied* 126 S. Ct. 366, 163 L. Ed. 2d 72 (2005) (*mem.*), both the district court and the Court of Federal Claims held that the claims were time-barred because they were filed more than six years after the Surface Transportation Board ("STB") issued the Notices of Interim Trail Use or Abandonment ("NITU"). We agree that *Caldwell* governs, and we affirm.

BACKGROUND

I

By 1990, the nation's interstate railway system had shrunk from its peak of 272,000 miles of track in 1920 to about 141,000 miles of track, and railroads continue abandoning track each year. *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 5, 110 S. Ct. 914, 108 L. Ed. 2d 1 (1990) ("*Preseault I*"). As the Supreme Court explained in *Preseault I*, the purpose of the Trails Act was to preserve unused railroad rights-of-way by converting them into recreational trails. *Id.* The mechanism is a STB order (a NITU) staying railroad abandonment during the pendency of trail use.

As described in detail in *Preseault I*, 494 U.S. at 7-8, *Preseault v. United States*, 100 F.3d 1525, 1537-40 (Fed. Cir. 1996) (*en banc*) ("*Preseault II*"), and *Caldwell*, 391 F.3d at 1228-30, in order to abandon a line that is subject to STB jurisdiction, a railroad must apply to the STB under either 49 U.S.C. § 10903 (standard abandonment), or 49 U.S.C. § 10502 (abandonment by exemption).[1] All proceedings involved in these appeals were exemption proceedings. Under the Trails Act, the STB may issue a NITU, suspending exemption proceedings for 180 days to allow a third party to enter into an agreement with the railroad to use the right-of-way as a recreational trail. 49 C.F.R. § 1152.29(b)(2) and (d) (2005). If the railroad and the trail operator reach an agreement, "the NITU extends indefinitely to permit interim

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[1] On January 1, 1996, the STB succeeded the Interstate Commerce Commission as the agency with authority to regulate the interstate rail system. 49 U.S.C. § 702 (2000). We use "STB" to refer to both agencies.

trail use . . . ." *Caldwell*, 391 F.3d at 1230; *see* 49 C.F.R. § 1152.29(d)(1). If no trail use agreement is reached, the NITU converts into an effective notice of exemption, allowing the railroad to "abandon the line entirely and liquidate its interest." *Preseault I*, 494 U.S. at 7; *see Caldwell*, 391 F.3d at 1230. While it retains jurisdiction over the right-of-way, the STB may reopen exemption proceedings to substitute a new trail operator, 49 C.F.R. § 1152.29(f), to accept late-filed trail use requests, 49 C.F.R. § 1152.29(e)(1), or to vacate a notice of exemption and issue a NITU when a railroad late files its statement of willingness to negotiate, 49 C.F.R. § 1152.29(g).

In *Preseault I*, the Court noted but did not resolve the claim that "Congress . . . violated the Fifth Amendment by precluding reversion of state property interests." 494 U.S. at 9; *see also id.* at 22 (O'Connor, J., concurring) (operation of the Trails Act "may delay property owners' enjoyment of their reversionary interests," which "burdens and defeats the property interest"). In *Preseault II*, we established that the elimination of adjacent landowners' state law reversionary interests when abandonment is suspended under the Trails Act constitutes a Fifth Amendment taking. 100 F.3d at 1550-52. In *Caldwell*, we held that such a claim accrues for statute-of-limitations purposes when railroad abandonment proceedings are suspended by the STB's issuance of a NITU. *Caldwell*, 391 F.3d at 1235. The Barclay appellants (the appellants in No. 05-1255) and Renewal (the appellant in No. 05-5109) challenge both the correctness of the *Caldwell* decision and its applicability to the particular facts of their takings claims.

II

The Barclay appellants filed their Trails Act takings claims in the United States District Court for the District of Kansas on April 7, 2004. The complaint alleged that railroad rights-of-way running across the Barclay appellants' property in Kansas were converted into three different recreational trails (the Meadowlark, Sunflower, and Flint Hills trails) pursuant to the Trails Act, and that these conversions constituted Fifth Amendment takings. The government moved to dismiss on the ground that the complaint was not filed within the six year statute of limitations. We decided *Caldwell* while the government's motion was pending. Because the initial NITUs for all three trails were issued prior to the cutoff date for the statute of limitations,[2] the district court dismissed the complaint.

The district court found that the Supreme Court's decisions in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974), and *Crown Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983), required tolling the statute of limitations for eleven months, three weeks, and one day, during the pendency of *Swisher v. United States*, 189 F.R.D. 638 (D. Kan. 1999), a class action alleging Trails Act takings in which the Barclay appellants were class members. The district court nevertheless concluded that the action was not timely filed, applying our holding in Caldwell that the claims accrued on issuance of the original NITUs. The district

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[2] The relevant NITUs were issued on September 28, 1995 (Meadowlark trail), April 12, 1996 (Sunflower trail), and March 31, 1995, and May 24, 1996 (Flint Hills trail). As noted the complaint was filed on April 7, 2004.

court rejected contentions that replacement NITUs, rather than the initial NITUs, triggered the accrual of their claims for the Flint Hills and Sunflower trails, holding that subsequently issued NITUs covering the same rights of way "merely continued in effect the blocking of the reversionary interests begun by the first NITU" and "could not amount to a separate taking of the property triggering a new claim . . . ." *Barclay*, 351 F. Supp. 2d at 1179. The Barclay appellants timely appealed, and we have jurisdiction pursuant to 28 U.S.C. § 1295(a)(2).

III

Renewal's complaint in the Court of Federal Claims alleged that Trails-Act conversion of a railroad right-of-way running across Renewal's property in California constituted a taking. The STB authorized abandonment effective May 28, 1995, and the putative trail operator filed a trail use request on May 23, 1995. The railroad had removed most of the track and equipment by July 1995, though abandonment had not been consummated under federal law. The STB subsequently issued a NITU on October 23, 1995, and the right-of-way was converted into a trail.

Renewal filed its complaint in the Court of Federal Claims on December 11, 2003. The Court of Federal Claims dismissed the complaint, relying on Caldwell to conclude that "Renewal's claim accrued on October 23, 1995, the day the NITU was issued," well outside the six-year limitations period. Renewal, 64 Fed. Cl. at 615. Renewal timely appealed, and we have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review both the district court's dismissal for want of jurisdiction and the legal conclusions of the Court of Federal Claims without deference. *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1362 (Fed. Cir. 2005); *Applegate v. United States*, 25 F.3d 1579, 1581 (Fed. Cir. 1994). We agree with the district court and the Court of Federal claims that these actions are time-barred under our decision in *Caldwell*.[3]

I

We explained in *Caldwell* that "the taking, if any, when a railroad right-of-way is converted to interim trail use under the Trails Act occurs when state law reversionary property interests that would otherwise vest in the adjacent landowners are blocked from so vesting." *Caldwell*, 391 F.3d at 1233. Abandonment is suspended and the reversionary interest is blocked "when the railroad and trail operator communicate to the STB their intention to negotiate a trail use agreement and the agency issues an NITU that operates to preclude abandonment under section 8(d)" of the Trails Act. *Id.* We concluded that "[t]he issuance of the NITU is the only *government* action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right of way." *Id.* at 1233-34 (emphasis in original). Thus, a Trails Act taking begins and a takings claim accrues, if at all, on

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[3] Because we agree with the district court that the Barclay appellants' claims were time-barred even assuming that the *Swisher* action tolled the limitations period, we do not decide here whether the *Swisher* action required tolling.

issuance of the NITU. We explicitly held in *Caldwell* that "[w]hile the taking may be abandoned . . . by the termination of the NITU[,] the accrual date of a single taking remains fixed." *Id.* at 1235. The issuance of the NITU is the only event that must occur to "entitle the plaintiff to institute an action." *Creppel v. United States*, 41 F.3d 627, 631 (Fed. Cir. 1994). Accrual is not delayed until a trail use agreement is executed or the trail operator takes physical possession of the right-of-way.

II

The Barclay appellants and Renewal first argue that *Caldwell* was wrongly decided and should be overruled. Panels of this court are bound by previous precedential decisions until overturned by the Supreme Court or by this court *en banc*. *Kimberly-Clark Corp. v. Fort Howard Paper Co.*, 772 F.2d 860, 863 (Fed. Cir. 1985). The court declined to rehear *Caldwell en banc*, and the Supreme Court denied certiorari. *Caldwell v. United States*, 126 S. Ct. 366, 163 L. Ed. 2d 72 (2005) (*mem.*). In any event, the majority of these arguments were rejected in *Caldwell*. To the extent that they are new, they are without merit.

The appellants and amicii contend that *Caldwell* was wrongly decided insofar as it relied on federal rather than state law to determine when abandonment and reversion of railroad rights-of-way occur.

Renewal argues that because the railroad had removed its track and equipment from the right-of-way by June 1995, effectively abandoning it under California law and granting Renewal "full and exclusive, undisturbed, and uncontested possession and use" of the property until trail use began, App. Br. of Renewal at 17, the issuance of the NITU in

October, 1995 did not block Renewal's reversionary interest. Thus, Renewal concludes that its claim did not accrue until it was physically ousted from the property when trail use began.

While state law generally creates the property interest in a railroad right-of-way, *Preseault I*, 494 U.S. at 8, 16,[4] "the disposition of reversionary interests [is] subject . . . to the [STB's] 'exclusive and plenary' jurisdiction to regulate abandonments" of railroad rights of way. *Id.* at 8 (quoting *Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 321, 101 S. Ct. 1124, 67 L. Ed. 2d 258 (1981)). Federal law dictates when abandonment occurs. Thus, Renewal is incorrect that state law governs the timing of the abandonment. Abandonment cannot occur until authorized by federal law, and the NITU precludes abandonment and the reversion that would follow if abandonment were consummated. 16 U.S.C. § 1247(d) (2000); 49 C.F.R. § 1152.29(d)(1); *Caldwell*, 391 F.3d at 1229; *Preseault v. Interstate Commerce Comm'n*, 853 F.2d 145, 151 (2d Cir. 1988) ("Until the [STB] issues a certificate of abandonment, the railway property remains subject to the [STB's] jurisdiction, and state law may not cause a reverter of the property."); *Nat'l Wildlife Fed'n v. Interstate Commerce Comm'n*, 271 U.S. App. D.C. 1, 850 F.2d 694, 704 (D.C. Cir. 1988) ("Nor may state law cause a reverter of a right-of-way prior to an [STB]-approved abandonment."). Thus, there could be no abandonment until authorized by federal law. The

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[4] In *Toews v. United States*, 376 F.3d 1371 (Fed. Cir. 2004), we reiterated that state law controls the basic issue of whether trail use is beyond the scope of the right-of-way. *Id.* at 1376-77. This merits question is distinct from the issue of claim accrual. *See also Hash v. United States*, 403 F.3d 1308, 1319-23 (Fed. Cir. 2005) (applying Idaho law to determine whether reversionary interests existed).

NITU barred the abandonment; abandonment cannot occur after issuance of a NITU while the NITU is in effect. The barrier to reversion is the NITU, not physical ouster from possession. As Renewal itself admits, after issuance of the NITU, "the easement continued in existence beyond the time when it otherwise would have been abandoned." Reply Br. of Renewal, at 4. Thus, the NITU triggers accrual.[5]

The Barclay appellants' state law argument is also without merit. In the case of the Meadowlark trail, they insist that the NITU would not itself block a reversion if the railroad continued to use the right-of-way for railroad purposes after the NITU was issued. They argue that under Kansas law (which assertedly is different from California law), the taking can occur only after federal law authorized abandonment--that is, when the railroad ceases operations and the trail operator assumes physical possession. They thus urge that the trail operator's physical occupation, and not the Meadowlark trail NITU, blocked the reversion.[6] But even if under Kansas law the reversion would not occur until after federal authorization of abandonment, that state law reversion was still delayed by the issuance of the NITU, and the claim still accrued with the issuance of the NITU. It similarly makes no difference that railroad use may have continued after the NITU issued. The termination of railroad use was still delayed by the NITU.

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[5] Renewal also appears to argue that the railroad conferred rights on Renewal to use the right-of-way for parking during the period of railroad use, and that the conversion to trail use ousted Renewal from the right to use the right-of-way for parking. Whether or not this is correct, the alleged ouster was not a consequence of actions taken under the Trails Act.

[6] Amicii Sarah and Gale Illig also advance this same argument.

III

The Barclay appellants also contend that *Caldwell* is distinguishable on a number of grounds.

A

The Barclay appellants argue that the original NITUs issued for the Flint Hills trail were vacated and that a second taking occurred when a new NITU was issued. Although issuance of a NITU requires that at least one trail operator file a statement of willingness to assume responsibility for the trail before issuance of the NITU, and that trail operator is listed in the NITU, the ordering clause of a NITU is not typically limited to a particular trail operator[7] and a railroad is free to negotiate a trail use agreement with any party. *See Rail Abandonments - Use of Rights-of-Way as Trails*, Ex Parte No. 274 (Sub. No. 13), 2 I.C.C. 2d 591, 605-06, 608, 1986 WL 68617 (1986) ("Rail Abandonments"); *Neb. Trails Council v. Surface Transp. Bd.*, 120 F.3d 901, 906 (8th Cir. 1997); *Goos v. Interstate Commerce Comm'n*, 911 F.2d 1283, 1293 (8th Cir. 1990). Nonetheless, it is common that, if after issuance of the NITU the trail operator named in the original

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[7] *See, e.g., Cent. Kan. Ry., LLC - Abandonment Exemption - In Marion & McPherson Counties, KS*, STB Docket No. AB-406 (Sub. No. 6X), 1996 WL 169774 (1996) (original Sunflower Trail NITU) (imposing no limitations on negotiating parties, referring only to "the trail user" in specifying the requirements for interim trail use); *Mo. Pac. R.R. Co. - Abandonment Exemption - In Morris & Dickinson Counties, KS*, STB Docket No. 3 AB (Sub. No. 121X), 1995 WL 137149 (1995) (Flint Hills trail, Dickinson Segment original NITU) (same); *Union Pac. R.R. Co. - Abandonment Exemption - In McPherson County, KS*, STB Docket No. 33 AB-(Sub. No. 89X), 1995 WL 569357 (1995) (same).

NITU becomes unwilling or unable to assume responsibility for the trail, a new operator will be able to be formally substituted by issuance of a new NITU before an agreement with the railroad is reached. It is also common for the original trail operator to become unwilling or unable to serve after an agreement is reached with the railroad, and for the original trail operator to propose to transfer trail use rights and responsibilities to a new trail operator. *See Rail Abandonments*, 2 I.C.C. 2d at 606-08 (recognizing such "serial trail use" as appropriate).

The regulations provide a mechanism for substituting trail operators and updating NITUs without abandonment. The original and replacement trail operators file a notice in accordance with 49 C.F.R § 1152.29(f)(1). Then, a new NITU (naming the new trail operator) is substituted for the original NITU (naming the original trail operator). As the regulation provides, "the board will reopen the abandonment or exemption proceeding, vacate the existing NITU or CITU; and issue an appropriate replacement NITU or CITU to the new trail user." 49 C.F.R. § 1152.29(f)(2). There is no gap between the original and replacement NITUs. Though formally "vacating" the original NITUs, the STB makes clear that, in substance, it is "substituting" trail users "in the [same] proceedings."[8]

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[8] *See Mo. Pac. R.R. - Abandonment Exemption - In Osage, Lyon, & Morris Counties, KS*, STB Docket No. 3 Ab-(Sub. No. 111X), *Mo. Pac. R. Co. - Abandonment Exemption - In Miami, Franklin, & Osage Counties, KS*, STB Docket No. 3 AB-(Sub . No. 115), *Mo. Pac. R. Co. - Abandonment Exemption - In Morris & Dickinson Counties, KS*, STB Docket No. AB-3 (Sub. No. 121X), 1997 WL 414314 (1997).

Under these circumstances, we agree with the district court's conclusion that the series of STB NITU orders must be viewed as part of a single and continuous government action rather than as new takings. Any other approach would result in multiple potential takings of the same reversionary interest. In *Caldwell*, we rejected that approach, following *United States v. Dow*, 357 U.S. 17, 24, 78 S. Ct. 1039, 2 L. Ed. 2d 1109 (1958), where the Supreme Court dismissed as "bizarre" the contention that there could be "two different 'takings' of the same property, with some incidents of the taking determined as of one date and some as of the other." So long as abandonment was not consummated, the STB retained jurisdiction over the right-of-way. *See Baros v. Tex. Mexican Ry. Co.*, 400 F.3d 228, 236 (5th Cir. 2005); *Birt v. Surface Transp. Bd.*, 319 U.S. App. D.C. 357, 90 F.3d 580, 585 (D.C. Cir. 1996). Thus, any extensions or modifications of the original NITU were not separate potential takings.

B

No different result is required for the Sunflower Trail NITU. The initial Sunflower Trail NITU was set to expire on June 6, 1997. Although a new trail operator filed a request to be substituted and for the issuance of a new NITU on June 6, the STB did not issue the NITU until 10 days later, on June 16, 1997. The Barclay appellants argue that under these circumstances the original NITU became inoperative, abandonment occurred, and the landowners' interest reverted. The replacement NITU in their view was a distinct government action that affected a new taking. Here again, however, the new NITU in substance merely extended the

original NITU[9] and listed a new potential trail operator. Moreover, it is clear that the STB had authority to extend the NITU and that abandonment did not occur in the interim. *See Birt*, 90 F.3d at 585-87. In *Birt*, a landowner argued that the STB abused its discretion by retroactively extending a CITU (the version of the NITU issued in standard abandonment proceedings rather than exemption proceedings) eight days after the CITU expired. The District of Columbia Circuit disagreed, concluding that the STB retained jurisdiction over the right-of-way, and thus had authority to issue the extension, because the railroad did not consummate abandonment while the CITU was expired. *Id.* at 585-87. The new CITU became merely a continuation of the old. We agree with the District of Columbia Circuit's decision in *Birt*. Here, the railroad did not consummate abandonment of the Sunflower Trail right-of-way or file a notice of consummation with the STB between June 6, 1997, the day the initial NITU expired, and June 16, 1997, the day the replacement NITU was issued.[10] Thus the new NITU was not a separate taking.

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[9] *Cent. Kan. Ry., LLC - Abandonment Exemption - In Marion & McPherson Counties, KS*, STB Docket No. AB-406 (Sub. No. 6X), 1997 WL 323576 (1997) ("Upon reconsideration, the notice of exemption served . . . on March 13, 1996, exempting the abandonment of the line described above is modified to the extent necessary to implement interim trail use/rail banking . . . until December 13, 1997.").

[10] As of December 24, 1996, the railroad must file a notice of consummation of abandonment with the STB within one year of the effective date of the notice of exemption permitting abandonment. 49 C.F.R. § 1152.29(e)(2); 61 Fed. Reg. 67876-01, 67896-97 (Dec. 24, 1996) (adding § 1152.29(e)(2)). The STB retains jurisdiction over the right-of-way until the notice of consummation is filed. *See Baros*, 400 F.3d at 236.

C

The Barclay appellants also insist that the Meadowlark Trail NITU did not block their reversionary interest because, unlike the NITU at issue in *Caldwell*, it contained a 180-day public use condition issued pursuant to 49 U.S.C. § 10905. The public use condition requires offering rights-of-way for sale to parties interested in using the property for, *inter alia*, "highways, other forms of mass transportation, conservation, energy production or transmission, or recreation." 49 U.S.C. § 10905 (2000). Here, at the time of the issuance of the NITU, a trail operator was named and the railroad had stated its willingness to negotiate a trail use agreement. The trail operator alternatively requested the issuance of the public use condition, apparently on the theory that a public use condition would preserve the right-of-way for trail use. In accordance with its policy, the STB issued both conditions simultaneously. The STB in the NITU made clear that the public use condition was "subject to the execution of a trail agreement," and that "[i]f an interim trail use/rail banking agreement is executed within the 180-day period specified above, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line segment." *Union Pac. R. Co. - Abandonment Exemption - In McPherson County, KS*, STB Docket No. AB-33 (Sub. No. 89X), 1995 WL 569357, (1995) ("*Meadowlark NITU*"). No agreement was reached under the public use condition, and it expired after 180 days.

The Barclay appellants' theory appears to be that if the right-of-way were purchased under the public use condition for a use that was within the scope of the right-of-way, for example, continued rail use for mass transit, reversion might not have occurred under state law, and hence that the

blockage of the reversion did not occur until the public use condition expired.

We do not think that *Caldwell* can be distinguished on this basis. The primary object of the NITU was to preclude abandonment and thus to enable a trail use agreement. But for the NITU's trail use condition, the railroad could abandon the line immediately and trigger the reversion, since the public use condition did not itself preclude abandonment. *See Fritsch v. Interstate Commerce Comm'n*, 313 U.S. App. D.C. 252, 59 F.3d 248, 252 (D. C. Cir. 1995) (section 10906 precludes sale or other disposal of the right-of-way, but not abandonment); *Nat'l Wildlife Fed'n*, 850 F.2d at 701-02 (what is now section 10905 "has no rail banking provision that would preempt state laws that could otherwise result in reversion of rights-of-way to abutting landowners upon a cessation of rail service"). The bar on abandonment effected by the NITU's trail use condition triggered accrual of the cause of action here just as it did in *Caldwell*.

D

Finally, the Barclay appellants argue that their Sunflower Trail claims did not accrue when the initial NITU was issued on April 12, 1996, because after the replacement NITU was issued on June 16, 1997, a group of landowners petitioned to reopen the exemption proceeding and vacate both the initial NITU and the replacement NITU. The petitioners argued that the railroad omitted material facts in its notice of exemption and that CKC was financially unfit to serve as trail operator. The STB denied the petition to reopen on December 18, 1998. The petitioners appealed to the District of Columbia Circuit, which affirmed in part and reversed in part on October 22, 1999. *See Jost v. Surface Transp. Bd.*, 338 U.S. App. D.C. 289, 194 F.3d 79 (D.C. Cir. 1999). On remand,

the STB further explained its reasoning and again denied the petition on May 8, 2001. That denial was not appealed.

The Barclay appellants contend that their claim did not accrue until the petition to reopen was finally denied on May 8, 2001, even though the original NITU as extended by the replacement NITU never ceased to be effective. This is merely another version of the argument -- rejected in Caldwell -- that the original NITU should not be viewed as the taking because subsequent events might render the NITU only temporary. The Sunflower Trail claims accrued when the original NITU issued, regardless of the petition to reopen.

IV

In summary, we adhere to *Caldwell* and hold that the issuance of the original NITU triggers the accrual of the cause of action. The appellants' arguments in these cases urging a different trigger, depending on when abandonment occurred under state law, when the last NITU in a series was issued, or when the NITU was no longer subject to collateral attack, merely emphasize the correctness of the *Caldwell* rule. Appellants' arguments lead potentially to multiple takings of a single reversionary interest and endless litigation concerning the appropriate date for accrual, thus leaving landowners and the government in a state of great uncertainty as to their respective rights and obligations. Here, as in *Caldwell*, we conclude that takings law supplies a single bright-line rule for accrual that avoids these adverse consequences.

CONCLUSION

The decisions of the district court and Court of Federal Claims dismissing the appellants' complaints are

AFFIRMED.

COSTS

No costs.

DISSENT

NEWMAN, Circuit Judge, dissenting.

The panel majority holds that a Fifth Amendment taking occurs in a rails-to-trails case, and is actionable for compensation, on the date the government issues a Notice of Interim Trail Use or Abandonment ("NITU"). Such Notice announces the railroad's right to abandon railway use and negotiate with a potential trail operator. If an agreement for interim trail use is reached, the right-of-way is rail-banked for possible future railway use. 16 U.S.C. § 1247(d). If such an agreement is not reached within 180 days, or an extension thereof, the right-of-way is deemed abandoned and any easements therefor are extinguished in accordance with the applicable state law. *See Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 7 n. 5, 110 S. Ct. 914, 108 L. Ed. 2d 1 (1989) ("If agreement [for interim trail use with a qualified trail operator] is reached, interim trail use is thereby authorized. If not, the CITU or NITU automatically converts into an effective certificate or notice of abandonment."). Thus, the statute and the NITU do not make trail use mandatory, and if trail use is not achieved, the statute effects

abandonment of railway use and reversion of the right-of-way easement.

A Fifth Amendment taking cannot occur simply upon issuance of a NITU, because the deprivation of the reversion has not yet occurred, and may never occur. If railway use is simply abandoned, the easement is extinguished, the property is unburdened, and no taking occurs. Thus the issuance of a Notice of Interim Trail Use or Abandonment is not a *per se* taking, and no right of compensation arises on issuance of the Notice. My colleagues err in holding that the period of limitations for Fifth Amendment compensation starts to accrue, and that an action can be brought, immediately upon issuance of the NITU. As explained in *Hair v. United States* 350 F.3d 1253 (Fed. Cir. 2003), a period of limitations does not accrue until an issue is actionable:

> The basic rule is that the clock of a statute of limitations begins to run from the date the plaintiff's cause of action "accrues," . . . A cause of action "accrues" when the plaintiff has a complete and present cause of action. "The earliest opportunity for a complete and present cause of action is that moment when the plaintiff has suffered a legally recognizable harm at the hands of the defendant, such as the time of contract breach or the commission of a tortious wrong."

Id. at 1260 (quoting 1 Calvin W. Corman, *Limitation of Actions* § 6.1 (1991)).

As discussed in *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996), the conversion of a railroad right-of-way to a recreational trail can constitute a Fifth Amendment taking. However, the cause of action and right to compensation do

not vest until the claim accrues. In *Boling v. United States*, 220 F.3d 1365 (Fed. Cir. 2000) this court reiterated that: "In general, a takings claim accrues when 'all events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence.'") *Id.* at 1370 (quoting *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988)). From my colleagues' ruling that a taking occurred as soon as the possibility arose for trail conversion as an alternative to abandonment of the right-of-way, I must, respectfully, dissent.

The general rule in physical takings cases is that the taking is actionable when the property is taken and liability is fixed, not when it is suggested to be taken. In *United States v. Clarke*, 445 U.S. 253, 100 S. Ct. 1127, 63 L. Ed. 2d 373 (1980) the Court stated that "physical takings by governmental bodies that may entitle a landowner to sue for compensation," 445 U.S. at 256, occur with the occupation of the property: "Condemnation proceedings, depending on the applicable statute, require various affirmative action on the part of the condemning authority. To accomplish a taking by seizure, on the other hand, a condemning authority need only occupy the land in question. "445 U.S. at 257. In *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 832, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987) the Court made clear that it is the permanent occupation or permanent right of traversal that triggers the owner's right to compensation, not the commencement of negotiations. *See generally Dow v. United States*, 357 U.S. 17, 78 S. Ct. 1039, 2 L. Ed. 2d 1109 (1958) (the taking occurred when the property was occupied, not when the deed was transferred some time later). In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982) the Court focused on the permanent physical occupation of the property in determining

whether a taking had occurred, not the legislative or administrative events that authorized that occupation.

The NITU is prospective, and requires additional steps by the rail carrier and others before either of the two options authorized by the NITU will take legal effect. *See* 49 C.F.R. § 1152.29. The NITU does not require that the railroad must consummate an agreement for rails-to-trails conversion. 48 C.F.R. §§ 1152.29(d), (e)(2); *see National Wildlife Federation v. Interstate Commerce Comm'n*, 271 U.S. App. D.C. 1, 850 F.2d 694, 700-02 (D.C. Cir. 1988). As discussed in the context of whether the issuance of a NITU must be preceded by an environmental impact study, the tentative aspect of the NITU is stressed:

> [I]ssuance of an NITU or CITU is not only incidental to the abandonment, but also is itself not a guarantee of eventual trail use. The NITU or CITU serves only "to provide an opportunity for the railroad and prospective trail users to negotiate an agreement; thus, when [the STB issues] a NITU or CITU there is only a *possibility* that a particular right-of-way actually will be used as a recreational trail."

Goos v. Interstate Commerce Comm'n, 911 F.2d 1283, 1293 (8th Cir. 1990) (emphasis in original).

When the government issued the NITU herein, it was not known whether the right-of-way would be converted to a recreational trail. If the ensuing negotiations had failed, such that the trail did not come into being, there could be no taking based on trail use. A suit for compensation is not ripe until the taking occurs. The panel majority states that "the termination of railroad use was still delayed by the NITU," maj. op. at 9, producing the incongruity whereby despite the

delay in abandonment, the majority holds that the cause of action had already accrued. A "delay" of possible conversion to trail use, while it remains unknown whether trail use will occur at all, is not a *per se* taking with already vested entitlement to compensation. A taking claim does not accrue until "all events have occurred that fix the alleged liability of the Government and entitle the plaintiff to institute an action." *Seldovia Native Ass'n v. United States*, 144 F.3d 769, 774 (Fed. Cir. 1998). The plaintiffs herein could not have sued for compensation while the trail use negotiations were ongoing; the period of limitations cannot accrue before suit could have been brought. *Hair*, 350 F.3d at 1260.

Indeed, the panel majority reinforces this view in its recognition that "So long as abandonment was not consummated, the STB retained jurisdiction over the right-of-way." Maj. op. at 11. Yet the "key date for accrual purposes is the date on which the plaintiff's land has been clearly and permanently taken." *Boling*, 220 F.2d at 1370 (citing *Seldovia*). A taking claim cannot accrue any earlier than when the indispensable event required to establish the government's liability has occurred. *See Hash v. United States*, 403 F.3d 1308, 1318 (Fed. Cir. 2005) ("On the railway's abandonment of its right-of-way these owners were disencumbered of the railway easement, and upon conversion of this land to a public trail, these owners' property interests were taken for public use, in accordance with the principles set forth in the *Preseault* cases.")

The panel majority errs in holding that the railroad's "willingness to negotiate a trail use agreement," maj. op. at 13, is an actionable Fifth Amendment taking. Although my colleagues extol the virtues of a "bright line" for accrual of the period of limitations, citing *Caldwell v. United States*, 391 F.3d 1226 (Fed. Cir. 2004), their choice of bright line would

vest compensation rights although no taking may ever occur. The issuance of a Notice of Interim Trail Use is not a taking, whether or not railway use has already been abandoned, and independent of when trail use is successfully consummated. For a taking, "the alleged harm must be actual or imminent, not conjectural or hypothetical." *Whitmore v. Kansas*, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990). As elaborated in *Preseault*, 100 F.3d at 1530 ("We find no support in Vermont law for the proposition, propounded by the defendants and accepted by the dissent, that the scope of an easement limited to railroad purposes should be read to include public recreational hiking and biking trails."), liability for a taking is based on the change in use of the easement from railroad use to recreational trail. Until that change is fixed and its occurrence firm, there is no accrual of the right to recover compensation for such taking.

To the extent that *Caldwell* is construed to hold otherwise, as does the panel majority, *Caldwell* warrants review. We should sit *en banc* for this purpose, for the government advises that there are some twenty-two pending cases arising from the National Trails System Act. It is appropriate and necessary for this court to clarify the inconsistencies in our precedent.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

No. 04-1119-WEB

[Filed December 29, 2004]

JOHN and CONSTANCE BARCLAY;
ROYER and ALTHEA BARCLAY;
JOHN AMOS; MARCIA J. BACON;
RONALD J. BARTEL; MELVIN BERGEN;
JOHN E. BOYLE; JONATHAN and
FLORENCE EHRLICH; DONALD GRAUMANN;
RUBEN KLIEWER; ALVIN and BARBARA KROUPA;
BURDETT LEDELL; LEE DALE MILLER;
VERNON MINNS; FRANK A. MITCHELL;
MID KANSAS COOPERATIVE ASSOCIATION;
JOHN F. OPAT; ROBERT PRESNELL;
JANET REGIER; SONJA REGIER;
DON and JANICE REINHARDT;
MARY J. RODGERS; DARRELL THOMPSON;
ROBERT TURNER; GENEVA and
DONALD TURNQUIST; CLARK E. WIEBE;
and MARLENE J. WEBER,
Plaintiffs,
v.

UNITED STATES OF AMERICA,
Defendant.

Wesley E. Brown, U.S. Senior District Judge

Memorandum and Order

The plaintiffs allege that they are fee simple owners of properties in Kansas which are subject to easements for railroad purposes. According to the complaint, these railroad rights-of-way have now been converted to recreational trail use pursuant to a federal "rails to trails" statute[1] Plaintiffs claim the conversion constitutes a taking of their property for public use which obligates the United States to provide just compensation under the Fifth Amendment. Relief is sought pursuant to the "Little Tucker Act," 28 U.S.C. § 1346(a)(2), in the form of damages, costs, interest, and other relief. The matter is now before the court on the United States' Motion to Dismiss, which alleges that the claims are barred by the statute of limitations. The court finds that oral argument would not assist in deciding the issues presented.

I. *Background.*

The background of the "rails-to-trails" act was explained in *Presault v. Interstate Commerce Commission*, 494 U.S. 1, 110 S. Ct. 914, 108 L. Ed. 2d 1 (1990). Pursuant to its authority to regulate interstate commerce, Congress gave the Interstate Commerce Commission (ICC), and later the Surface Transportation Board (STB), exclusive authority over the construction, operation, and abandonment of the nation's rail

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[1] *See the National Trails System Act*, 16 U.S.C. § 1241 *et seq.* The Act provides for the conversion of unused railroad rights-of-way into recreational trails notwithstanding whatever reversionary property interests may exist under state law. *See Preseault v. ICC*, 494 U.S. 1, 110 S. Ct. 914, 108 L. Ed. 2d 1 (1990).

lines. Rail trackage in the United States peaked at around 272,000 miles in 1920 and has declined significantly since them. *Id.* at 5. By 1990, only about 141,000 miles were in use, with 3,000 more miles expected to be abandoned every year. *Id.* Pursuant to statute and regulation, when a railroad operator wants to cease operations on a rail line it must file notice of its intent with the STB. The STB may authorize the abandonment only if it finds that public convenience and necessity require it. 49 U.S.C. § 10903(d). Once a carrier abandons a line pursuant to authority granted by the STB, the line is no longer part of the national transportation system. Abandonment of a rail line may trigger reversionary interests in the property because many railroads do not own the rights-of-way upon which they operate; they merely own easements or similar interests. Frequently these easements provide that the right-of-way reverts to the abutting landowner upon abandonment of rail operations.

In 1976, Congress passed the National Trails System Act, which was aimed at promoting the conversion of abandoned rail lines to recreational trails. *Id.* at 6-7. This Act encouraged the Government to promote conversion and authorized the ICC to delay disposition of rail property unless the property were first offered for sale on terms providing for public use. By 1983, Congress concluded these provisions had not been successful, and it amended the Trails Act to give the ICC authority to preserve rights-of-way not currently in service for possible future railroad use (called "rail banking") and to allow interim use of the land as recreational trails. *Id.* The amendments provide that a railroad wishing to cease operations along a particular route may negotiate with a State, municipality or private group that is prepared to assume financial and management responsibility for the right-of-way. If the parties reach an agreement, the land maybe transferred to the trail operator for interim trail use, subject to ICC-

imposed terms. If no agreement is reached, the railroad may be permitted to abandon the line entirely. *Id.* at 6-8.

Under implementing regulations, a railroad may apply to the STB for a Certificate of Interim Trail Use or Abandonment (CITU) or, in a proceeding involving the exemption of a route from STB regulation, a Notice of Interim Trail Use or Abandonment (NITU). The issuance of a CITU or NITU provides a 180-day period in which the railroad may, among other things, negotiate an agreement for interim trail use with a qualified trail operator. (This 180-day period may be extended by the STB). If an agreement is reached, interim trail use is thereby authorized. Federal law provides that if such interim use is subject to restoration for railroad purposes, "such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. § 1247(d). This effectively preempts the operation of reversionary clauses under state property law and prevents the property from reverting to the abutting landowner. It has also given rise to claims, including the instant one, that the conversion constitutes a taking of private property for public use.

In *Presault* the Supreme Court found the Trails Act was a valid exercise of Congress' power under the Commerce Clause. *Presault*, 494 U.S. at 19. Moreover, it said even assuming that the conversion of a right-of-way to a trail constituted a "taking" of the property, the availability of a remedy under the Tucker Act rendered premature any claim that the taking was without just compensation. *Id.* at 16-17.

II. *Summary of Relevant Facts.*

The following summary is from the complaint and the uncontroverted facts in defendant's motion to dismiss. The claims in the case relate to three separate recreational trails: the Meadowlark Trail; the Sunflower Trail; and the Flint Hills Nature Trail.

A. *The Meadowlark Trail.* The Union Pacific (UP) was the last railroad to hold the right-of-way in McPherson County, Kansas upon the properties of the plaintiffs identified in ¶ 6 of the complaint. On June 22, 1995, the UP filed a notice of exemption (*see* 49 CFR § 1152.50) to abandon its McPherson County railroad line (12.6 miles of railroad between milepost 518.0 near McPherson, Kansas, and milepost 530.6 near Lindsborg, Kansas). On August 18, 1995, the City of Lindsborg requested that a Notice of Interim Trail Use (NITU) be issued for this 12.6 mile line under the National System Trails Act (16 U.S.C. § 1247(d)) so as to enable the City to acquire the right-of-way for use as a recreational trial. Thereafter, the City submitted to the STB a statement of willingness to assume financial responsibility for interim trail use and rail banking in compliance with 49 CFR § 1152.29. On September 6, 1995, the UP responded that it was willing to negotiate with the City of Lindsborg concerning interim trail use.

On September 28,1995, the STB issued and served a NITU imposing both a 180-day public use condition (42 U.S.C. § 10906) and a 180-day trail use/rail banking condition (16 U.S.C. § 1247(d)) in connection with the proposed abandonment. On March 26, 1996, the STB extended the NITU negotiating period by an additional 180 days, through September 22, 1996. A motion to extend the negotiating period was filed on September 18, 1996, which

was granted by the STB on January 27, 1997, extending the negotiating period through March 21, 1997. On March 25, 1997, the STB extended the period through April 20, 1997.

On April 16, 1997, the UP issued a "Donative Quitclaim Deed" to the Central Kansas Conservatory [or Conservancy] Inc. (CKC), which purported to convey to CKC all of UP's right, title and interest to the real estate in the portion of the McPhersonline being abandoned by UP. On the same day, the UP and CKC entered into a "Line Donation Contract" which stated that the contract and deed were made in accordance with and subject to the Trails Act. Since the contract and deed were executed, CKC has exercised exclusive control, pursuant to the Trails Act, over the location of the former railroad right of way in McPherson County, which is now known as the Meadowlark Trail.

B. *The Sunflower Trail*. The last railroad to hold the right-of-way in Marion and McPherson Counties upon the properties of the plaintiffs identified in ¶ 5 of the complaint was Central Kansas Railway, LLC ("Central Kansas"). On February 22, 1996, Central Kansas filed a notice of exemption under 49 CFR § 1152 to abandon this line (specifically, 33.4 miles from milepost 10 plus 2418 feet at or near Marion to milepost 43 plus 4505 feet at or near McPherson). The exemption was scheduled to become effective on April 12, 1996. On April 12, 1996, the STB issued a NITU and stayed the exemption for six months to permit Central Kansas to negotiate with Jennings & Co., which had filed a statement of willingness to assume responsibility for the line. The STB granted two additional extensions. The CKC filed a statement of willingness to assume responsibility for the trial and requested issuance of a NITU. On June 12, 1997, the STB issued a second NITU and postponed the effective date of the exemption until

December 13, 1997. On September 19, 1997, Central Kansas issued to the Central Kansas Conservatory [or Conservancy] (CKC) a "Donative Quitclaim Deed" which purported to convey all of the railroad's right, title and interest in the real estate on the portion of the line that was to be abandoned by Central Kansas. The deed made reference to a "Line Donation Contract" between Central Kansas and the CKC dated June 6, 1997. Since this conveyance, CKC has exercised exclusive control, pursuant to the Trails Act, over the location of the former railroad right of way, which is now known as the Sunflower Trail.

C. *The Flint Hills Nature Trail.* The Flint Hills Nature Trail is a total of 64.4 miles in length. It is comprised of two different portions of railroad corridor that were originally subject to separate STB proceedings.

The first portion is 37.8 3 miles in length and lies in Osage, Lyon and Morris Counties between mile post 388.25 near Osage City, Kansas, and milepost 425.0 near Council Grove, Kansas. The last railroad to hold the right-of-way on the property of the Plaintiffs identified in ¶ 7 of the Complaint was the Missouri Pacific (MP), which merged with the UP in 1997. On December 7, 1993, MP served a notice of exemption (49 CFR § 1152) to abandon this portion of its rail line. On October 31, 1994, a NITU was issued to allow MP to negotiate a trail use agreement with the Rails-to-Trails Conservancy (RTC).

The second portion of this corridor is 26.57 miles in length and lies in Dickinson and Morris Counties between milepost 451.57 near Herington, Kansas, and milepost 425.0 near Council Grove, Kansas. The last railroad to hold the right-of-way on the property of the Plaintiffs identified in ¶ 8 of the Complaint was also the MP. On March 2, 1995, MP

served a notice of exemption (49 CFR § 1152) to abandon this portion of its rail line. On March 31, 1995, a NITU was issued to allow MP to negotiate a trail use agreement with the Rails-to-Trails Conservancy (RTC).

On December 18, 1995, MP notified the STB that, effective December 15, 1995, MP's Hoisington Subdivision, including the two portions described above, had been conveyed to the RTC in accordance with the Trails Act. That portion of the railroad right-of-way is now known as the Flint Hills Nature Trail.

On March 1, 1996, with the approval of MP, RTC conveyed these portions to the Seranta Farms School of Equestrian Arts. The STB then issued NITUs that vacated the previous ones and substituted Seranta as the new trail user. On July 14, 1997, the Kansas Horseman Foundation (KHF) and Seranta, with the approval of the UP, announced they had entered an agreement to transfer ownership of and management responsibility for the trail. On July 21, 1997, the STB again vacated the prior NITUs and issued a new one substituting KHF in lieu of Seranta as the interim trail manager.

D. *Alleged Takings*. Plaintiffs allege that they are fee simple owners of portions of land underlying these three trails; that the railroads abandoned their easements on the land; and that full ownership and control of the land would have reverted to the plaintiffs but for the operation of the Trails Act. They allege the Government has not instituted condemnation proceedings or paid plaintiffs any compensation. Plaintiffs contend the conversion of the property for rail banking/interim trail use constitutes a taking of property for public use which obligates the Government to provide just compensation.

III. *Motion to Dismiss.*

The parties agree the claims are subject to the limitations period in 28 U.S.C. § 2401(a). That section states in part that a civil action against the United States is barred unless the complaint is filed "within six years after the right of action first accrues." *Id.* Plaintiffs' complaint was filed April 7, 2004, meaning that unless the limitations period was tolled (an issue the court will discuss infra), the claims are barred if they accrued at any time before April 7, 1998.

The United States' motion to dismiss, which is asserted under Fed.R.Civ.P. 12(b)(1), argues that all of the claims accrued prior to April 7, 1998, and that as a result, the court lacks jurisdiction to hear the claims. *Citing, inter alia, Bray v. United States*, 785 F.2d 989, 992 (Fed. Cir. 1986); *Urabazo v. United States*, No. 91-6028, 1991 WL 213406 at **1 (10th Cir., Oct. 21, 1991) (unpublished). The Government notes that a cause of action for an unconstitutional taking accrues at the time the taking occurs. It contends the court need not determine precisely when any takings occurred, however, because all of the relevant dates in the complaint are prior to April 7, 1998. Additionally, the Government argues that the proper accrual date is the date upon which both a NITU had been issued and a trail use agreement was reached. *Citing Caldwell v. United States*, 57 Fed. Cl. 193 (2003).

Plaintiffs contend the Government's motion to dismiss is improperly asserted under Rule 12(b)(1), because the limitations issue is an affirmative defense upon which the Government bears the burden of proof, rather than an issue of subject matter jurisdiction for the plaintiffs to allege and prove. Plaintiffs further argue that the proper course is for the Government to file a motion to dismiss under Rule 12(b)(6),

where the burden is on the Government to show there is no possible set of facts that would allow the plaintiffs to establish the timeliness of their claims. *Citing Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1207 (9th Cir. 1995). Lastly, plaintiffs argue that their claims are timely because the limitations period was tolled by the pendency of a class action suit. Plaintiffs note that on October 2, 1998, the plaintiff in *Swisher v. United States*, No. 98-1352 (D. Kan.) filed a complaint on behalf of a nationwide class of landowners whose property was taken for trail purposes pursuant to the Trails Act. On September 24, 1999 -- eleven months, three weeks and one day after the action was filed -- the district court denied a motion to certify this class. *See Swisher v. United States*, 189 F.R.D. 638 (D. Kan. 1999). Relying on *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974), plaintiffs argue the limitations period was tolled during the pendency of this class action. Plaintiffs argue that when this "extra" period of nearly one year is considered, their claims were filed within the 6-year limitation period.

The parties have cited *Caldwell v. United States*, 57 Fed. Cl. 193 (2003) in their briefs, and they point out that this case, which involves issues similar to the instant case, has been pending on appeal before the Federal Circuit Court of Appeals. Plaintiffs argued that the motion to dismiss should be denied or deferred pending a ruling by the Federal Circuit in *Caldwell*. The Federal Circuit has now issued its decision, *see Caldwell v. United States*, 391 F.3d 1226, 2004 WL 2861371 (Fed. Cir., Dec. 14, 2004), and the decision constitutes controlling authority for purposes of this case. *See* 28 U.S.C. § 1295(a)(2) (granting Federal Circuit jurisdiction over district court decisions of non-tax claims under the Little Tucker Act). Accordingly, the court will apply the accrual rule announced by the Federal Circuit in *Caldwell*. The court

notes that *Caldwell* has altered the assumption of both parties in this case that the existence of a trail use agreement is the event giving rise to a takings claim against the Government. Instead, the *Caldwell* panel found it is the issuance of a NITU (Notice of Interim Trail Use or Abandonment) that gives rise to a cause of action.

IV. *Discussion.*

A. *Rule 12(b)(1) vs. 12(b)(6).* The six-year limit in § 2401(a) has previously been characterized as a jurisdictional condition attached to the Government's waiver of sovereign immunity. *See Bray v. United States*, 785 F.2d 989, 992 (Fed.Cir.1986). This might suggest that the time limit is a jurisdictional prerequisite which should be considered under Rule 12(b)(1), and which would not be subject to judicially created doctrines such as waiver, estoppel, and equitable tolling. *Cf. Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988) (noting that because parallel provision in § 2501 is a jurisdictional limitation rather than an affirmative defense, it is not capable of waiver or subject to estoppel). But in *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990), the Supreme Court found that limitation statutes like § 2401 are presumably subject to the same equitable tolling rules that apply to suits against private parties. *Cf. United States v. Brockamp*, 519 U.S. 347, 117 S. Ct. 849, 136 L. Ed. 2d 818 (1997). After *Irwin*, courts have expressed some uncertainty over whether a motion of this sort raises a jurisdictional issue under Rule 12(b)(1) or whether it involves an affirmative defense governed by Rule 12(b)(6) standards. *See Harris v. F.A.A.*, 359 U.S. App. D.C. 281, 353 F.3d 1006, 1013, n.7 (D.C. Cir. 2004) (declining to decide which standard is appropriate); *Lord v. Babbitt*, 943 F. Supp. 1203, 1209 (D. Alaska 1996) (applying Rule 12(b)(6)); *Supermail Cargo, Inc.*

v. United States, 68 F.3d 1204, 1206-07 (9th Cir. 1995) (motion should be addressed under Rule 12(b)(6) standards and should be granted only if plaintiff could prove no set of facts that would establish the timeliness of the claim); *Diltz v. United States*, 771 F. Supp. 95, 97 (D.Del., 1991) (*Irwin* implicitly holds that compliance with the statute of limitations is not a jurisdictional prerequisite; consequently, the two-year limitation period of section 2401(b) does not implicate the court's subject matter jurisdiction and failure to comply with it is merely an affirmative defense, the burden of establishing that defense being upon the United States). *But cf. Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1041, n.4 (10th Cir. 1980) ("While the statute of limitations is an affirmative defense, when the dates given in the complaint make clear that the right sued upon has been extinguished, the plaintiff has the burden of establishing a factual basis for tolling the statute."). The weight of authority after *Irwin* appears to be that such a motion is more properly treated under Rule 12(b)(6). *Cf. Venture Coal Sales v. United States*, 370 F.3d 1102, 1105, n.2 (Fed. Cir. 2004) ("The most precise ground for the trial court's decision here therefore would seem to be that [plaintiff] failed to make its claim within the required limitations period -- that is not a question of subject matter jurisdiction of the court.").

The court determines that this dispute makes no practical difference here, because the facts relating to the statute of limitations appear to be undisputed. Even assuming the motion is more properly addressed under Rule 12(b)(1) than 12(b)(6), as the United States contends, the court would allow the plaintiffs an opportunity in these circumstances to amend their complaint to include allegations relating to the statute of limitations and to tolling, and if necessary it would permit them an additional opportunity to present any evidentiary materials to support the allegations. *Cf. Cedars-Sinai Medical*

Center v. Watkins, 11 F.3d 1573, 1583-84 (Fed. Cir. 1993) (noting that in a challenge to the factual basis for jurisdiction, the court is not restricted to the face of the pleadings, but may review evidence including affidavits and deposition testimony). Given the uncontroverted facts, however, the court finds such a procedure is unnecessary. The statute of limitations issue as presented is essentially one of law, with the relevant facts being undisputed. As such, whether Rule 12(b)(1) or 12(b)(6) controls is not material for purposes of the instant motion.

B. *Accrual of a right of action*. Under Section 2401(a), a civil action against the United States must be filed within six years after the right of action first accrues. A claim accrues for purposes of 28 U.S.C. § 2401(a) "when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998). In *Caldwell v. United States*, ___F.3d___, 2004 WL 2861371 (Fed. Cir. 2004), a panel of the Federal Circuit concluded by a 2-to-1 majority that a "taking" occurs under the Trails Act (if at all) when state law reversionary property interests that would otherwise vest in the adjacent landowners are blocked from vesting. *Id.* at *5. In the context of an exemption proceeding like the instant case, this occurs when the railroad and a trail operator communicate to the STB their intention to negotiate a trail use agreement and the agency issues a NITU that operates to preclude abandonment under 16 U.S.C. § 1247(d) of the Trails Act. *Id.* Thus, the issuance of a NITU is the triggering event for accrual of a "takings" claim under the Trails Act. *Id.* at *7.[2]

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[2] The *Caldwell* majority recognized that a NITU "operates as a single trigger to several possible outcomes," including the

C. *Tolling of the Limitations Period*. Before the court can determine if plaintiffs' claims were timely filed, it must examine not only when the claims accrued but also whether the limitations period was tolled at some point after accrual. Plaintiffs argue that the limitations period was tolled by the filing of a class action of which they were potential members. *See Swisher v. United States*, No. 98-1352 (D. Kan.).

In *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974), the State of Utah filed a civil action under the Sherman Act allegedly on behalf of a class of state and local agencies who were end-users of concrete and steel pipe sold by American Pipe and others. The suit was commenced 11 days before the statute of limitations would have expired on the claims of the potential class members. Several months later, the district court determined that the prerequisites for a class action were not met. Eight days after that, several of the purported class members moved to intervene in the case as individual plaintiffs. The district court denied their motion, finding that the statute of limitations had expired on the claims of these plaintiffs. The Supreme Court ruled that the claims were timely, holding that the commencement of a class action lawsuit suspends the applicable statute of limitations as to all members of the class who would have been parties had the suit been permitted to continue as a class action. *Id.* at 554. In a later case, the Supreme Court applied the same rule to asserted class members who filed separate actions after the

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possibility that negotiations may fail, which could lead to abandonment of the easement. *Id.* at *6. In that circumstance, the court said, the taking of the property maybe found to have been temporary rather than permanent, but the claim still accrued when the NITU was issued. *Id.* at *6 7.

denial of class certification. *See Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 353-54, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983). Absent this rule, the Court noted, potential class members would have an incentive to file individual actions prior to a denial of class certification, in order to preserve their rights. This would defeat the principal purposes of the class action procedure -- i.e., the promotion of efficiency and economy of litigation. The Court also noted that the rule was consistent with the statute of limitations' principal purpose of requiring fair and timely notice of claims, because the filing of a class action within the limitations period puts the defendant on notice of the nature and scope of the claims. *American Pipe*, 414 U.S. at 555.

Defendant argues that *American Pipe* tolling does not apply here because after the *Swisher* court denied the class certification, the plaintiffs still had ample time to file individual claims within the original limitations period. According to the defendant, *American Pipe* was only designed to protect plaintiffs whose claims would otherwise expire while a class action suit is pending. The defendant cites no authority for this argument, however, and the court cannot accept it as a valid limitation on the tolling rule announced in *American Pipe*. Nothing in the decision itself suggests such a limitation, and the Government's argument appears contrary to the Supreme Court's unqualified pronouncement that the filing of a class action "suspends" the applicable statute of limitations. *Cf. Chardon v. Fumero Soto*, 462 U.S. 650, 652, n.1, 103 S. Ct. 2611, 77 L. Ed. 2d 74 (1983) (using the term "tolling" to mean that the statute of limitations *ceases to run*). Such a rule might also create incentives for potential class members to prepare and file separate actions as the end of the original limitations period approaches, something that is clearly at odds with the purpose of the tolling rule. In sum,

the court rejects the argument that the plaintiffs cannot claim the benefit of *American Pipe* tolling.

On October 2, 1998, Cheryl Swisher filed a complaint in the U.S. District Court for the District of Kansas on behalf of a nationwide class of landowners whose property was allegedly taken by the United States under the Trails Act. (*Swisher v. United States*, No. 98-1352 (D. Kan.)). The district court denied a motion to certify the *Swisher* class on September 24, 1999. *Swisher v. United States*, 189 F.R.D. 638 (D. Kan. 1999). The United States apparently concedes that the plaintiffs in the instant case were potential members of the *Swisher* class and that their claims were within the scope of the claims asserted in *Swisher*. Consistent with the *American Pipe* rule, the court concludes that the statute of limitations on plaintiffs' claims was suspended during the period from October 2, 1998, to September 24, 1999. *Cf. Caldwell*, 2004 WL 2861371 at *7 (finding the appellant waived his tolling argument on by raising the issue for the first time in a motion for reconsideration). As plaintiffs points out, the foregoing period was eleven months, three weeks, and one day.

D. *Application to plaintiffs' claims*.

1. *The Meadowlark Trail*. The STB issued a NITU pertaining to the Meadowlark Trail on September 28, 1995. The negotiating period was thereafter extended several times before a trail use agreement was entered into. Pursuant to the *Caldwell* decision, any "takings" claim relating to this trail accrued on September 28, 1995. Plaintiffs had a six-year period thereafter to file a claim relating to the Meadowlark Trail.

Plaintiffs' six year period ran until October 2, 1998, when the statute of limitations was suspended by the filing of the *Swisher* class action. At that point, plaintiffs had approximately three years (specifically, three years minus three days) left in the limitations period. The period commenced running again on September 24, 1999, when the *Swisher* class was denied. Plaintiffs thus had the same three year period (minus three days) thereafter to file their claims, or until September 21, 2002. The complaint in this case was filed on April 7, 2004, well outside this six-year period. Accordingly, the court finds that plaintiffs' claims relating to the Meadowlark Trail are barred by the statute of limitations in 28 U.S.C. § 2401(a).

2. *The Sunflower Trail*. The STB issued two NITU's relating to the Sunflower Trail. The first was issued on April 12, 1996. If this NITU is the triggering event for plaintiffs' takings claim, then under the same counting rules indicated above -- including tolling of the period during the *Swisher* class action -- the court calculates that the six-year limitations period ended on or about March 30, 2003. Because plaintiffs' complaint was not filed until April 7, 2004, well after the cut-off date, any claims arising by virtue of the first NITU are barred by § 2401(a).

The second NITU relating to the Sunflower Trail was issued on June 12, 1997. If this second NITU constituted the triggering event for a takings claim, then the six-year limitations period (again taking into account the portion tolled by *Swisher*) would have expired on or about June 4, 2004. Plaintiffs' complaint was filed prior to that time. Thus, a takings claim based on the second NITU would be timely under § 2401(a). Under the reasoning of *Caldwell*, however, the court must conclude that the issuance of the second NITU did not give rise to a separate cause of action, and therefore

was not a triggering event for purposes of the statute of limitations. *Caldwell* recognized that issuance of a NITU "operates as a single trigger to several possible outcomes":

> It may, as in this case, trigger a process that results in a permanent taking in the event that a trail use agreement is reached and abandonment of the right-of-way is effectively blocked. Alternatively, negotiations may fail, and the NITU would then convert into a notice of abandonment. In these circumstances, a temporary taking may have occurred. It is not unusual that the precise nature of the takings claim, whether permanent or temporary, will not be clear at the time it accrues.

Caldwell, ___F.3d at ___, 2004 WL 2861371 at *6 [citations and footnote omitted]. As *Caldwell* explained, it is the issuance of a NITU that "marks the finite start' to either temporary or permanent takings claims by halting abandonment and the vesting of state law reversionary interests when issued." *Id.* at *7. *Caldwell* cited *United States v. Dow*, 357 U.S. 17, 78 S. Ct. 1039, 2 L. Ed. 2d 1109 (1958), a case involving the accrual date for a takings claim where the Government took possession of certain property some three years before it obtained formal title to the property. According to *Caldwell*, the *Dow* Court rejected an argument that there had been two separate takings of this property, holding instead that the taking occurred when the owner had been deprived of the use of the property through the Government s possession of it, and not when the Government later obtained formal title to the property. Applying this principle, *Caldwell* said that in the context of a rails-to-trails conversion, it did not matter that the property taken through the issuance of a NITU might subsequently be abandoned, because "the government's decision to abandon

the taking merely results in an alteration to the property interest taken -- from full ownership to one of temporary use and occupation.'" *Caldwell*, 2004 WL 2861371 at *7.

This reasoning leads to a conclusion that the second NITU relating to the Sunflower Trail did not give rise a claim separate and distinct from any claim triggered by the first NITU. The first NITU was the finite start of plaintiffs' claim that the defendant took the property by halting abandonment and the vesting of reversionary interests. The issuance of the second NITU allowed for a further extension of the negotiating period, and it allowed the railroad to negotiate with a different trail operator, but the plaintiffs had already been deprived of the use of their property (assuming their allegations to be true) as of the issuance of the first NITU. The second NITU merely continued in effect the blocking of the reversionary interests begun by the first NITU. There is no allegation that the second NITU involved the taking of some greater portion of the right-of-way not covered by the first NITU, or that there was some type of intervening event that would permit the second NITU to be viewed a separate taking of the property. *Cf. Id.* at *7 (noting that abandonment of the property after issuance of a NITU may alter the nature of the taking from full ownership to temporary use, but does not give rise to a separate takings claim). As such, the court finds that plaintiffs' claims relating to the Sunflower Trail are barred by the statute of limitations in 28 U.S.C. § 2401(a).

3. *The Flint Hills Nature Trail.* The Flint Hills Nature Trail conversion involved a series of NITUs. The first NITU, relating to the 37.83 miles of rail line identified in ¶ 22 of the Complaint, was issued by the STB on October 31, 1994. A second NITU, which applied to the 26.57 miles of rail line identified in ¶ 23 of the Complaint, was issued on March 31, 1995. These NITUs imposed interim trail use conditions and

authorized the Missouri Pacific (MP) to negotiate a trail agreement with the Rails-to-Trails Conservancy (RTC). On December 18, 1995, MP notified the STB that it had conveyed its entire Hoisington Subdivision, including the two portions mentioned above, to the RTC under the Trails Act.

On March 1, 1996, after RTC conveyed the Hoisington Subdivision to Seranta, the STB reissued NITUs that vacated the previously issued ones and substituted Seranta as the new trial user. On July 21, 1997, after ownership and management was transferred by Seranta to the Kansas Horseman Foundation (KHF), the STB again vacated the prior NITUs and issued new ones substituting KHF for Seranta as the interim trail manager.

Although the procedure involving this particular trial was somewhat complicated, under the rule announced in *Caldwell* it was the issuance of the first set of NITU's, which prevented the rights-of-way from reverting to plaintiffs' property, that constitutes the triggering event for any taking claim under the facts alleged. The mere extension of a NITU negotiating period or the vacating of one NITU by another in order to substitute the designated trail operator could not amount to a separate taking of the property triggering a new claim under the facts alleged by the plaintiffs. Under these facts, the issuance of the first two NITUs -- on October 31, 1994, and March 31, 1995 -- gave rise to any cause of action plaintiffs had for the taking of their property. Under the counting rules noted above, the six-year limitation period on any such claim expired before the filing of the complaint in this action. Accordingly, the court concludes that the plaintiffs' claims relating to the Flint Hills Nature Trail are barred by the statute of limitations in 28 U.S.C. § 2401(a).

V. *Conclusion.*

The court concludes that all of the claims alleged by plaintiffs are barred by the statute of limitations in 28 U.S.C. § 2401(a). Accordingly, defendant United States' motion to dismiss the complaint (Doc. 9) is GRANTED for failure to state a claim upon which relief can be granted, and the action is hereby dismissed on the merits. The clerk is directed to enter judgment accordingly.

IT IS SO ORDERED this 29th Day of December, 2004, at Wichita, KS.

s/Wesley E. Brown
Wesley E. Brown
U.S. Senior District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

03-5152

[Filed December 14, 2004]

WILLIAM B. CALDWELL, III and BEN FRANK BILLINGS, III (for themselves and as representative of a class of similarly situated persons), Plaintiffs-Appellants,	)
v.	)
UNITED STATES, Defendant-Appellee.	)

Appealed from: United States Court of Federal Claims
Judge Christine O.C. Miller

Before NEWMAN, DYK, and PROST, Circuit Judges. Opinion for the court filed by Circuit Judge DYK. Dissenting opinion filed by Circuit Judge NEWMAN.

OPINION

DYK, Circuit Judge.

Appellants William B. Caldwell, III and Ben Frank Billings, III (collectively "Caldwell") brought a class action lawsuit seeking compensation for an alleged taking pursuant to the National Trail Systems Act (the "Trails Act"), 16 U.S.C. § 1247(d). The Court of Federal Claims held that the appellants' claim was barred under the applicable statute of limitations, 28 U.S.C. § 2501, because it accrued more than six years before the lawsuit was filed. *Caldwell v. United States*, 57 Fed. Cl. 193 (2003). Because the appellants' claim accrued when the exemption proceedings were halted by the issuance of a Notice of Interim Trail Use or Abandonment ("NITU"), we affirm.

BACKGROUND

I

We have previously held that a Fifth Amendment taking occurs when, pursuant to the Trails Act, state law reversionary interests are effectively eliminated in connection with a conversion of a railroad right-of-way to trail use. *Preseault v. United States*, 100 F.3d 1525, 1543 (Fed. Cir. 1996) (*en banc*) ("*Preseault II*"); *see also Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004). This case requires us, for the first time, to determine when the Fifth Amendment takings claim accrues for purposes of the six-year statute of limitations under the Tucker Act. 28 U.S.C. § 2501 (2000). The following is a brief summary of the Trails Act, which is described in some detail in *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 7-8, 110 S. Ct. 914, 108 L. Ed. 2d 1 (1989) ("*Presault I*"), the case in which the

Supreme Court upheld the constitutionality of the Act under the Commerce Clause.

The Surface Transportation Board (the "STB" or "Board")[1] has authority to regulate the construction, operation, and abandonment of most railroad lines in the United States. A railroad seeking to abandon a railroad right-of-way within the jurisdiction of the STB must either: (1) file a standard abandonment application that meets the requirements of 49 U.S.C. § 10903; or (2) seek an exemption, under 49 U.S.C. § 10502.[2] If the STB approves a standard abandonment application or grants an exemption and the railroad ceases operation, the STB relinquishes jurisdiction over the abandoned railroad right-of-way and state

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[1] The Surface Transportation Board is the successor agency to the Interstate Commerce Commission and assumed control on January 1, 1996. 49 U.S.C. § 702 (2000). We use "STB" to refer to both agencies.

[2] Authorization of abandonment pursuant to the exemption procedures of section 10502 is less involved than the standard abandonment proceedings detailed in section 10903 and can be invoked under the statute when it:

> (1) is not necessary to carry out the transportation policy of section 10101 of [Title 49]; and
> (2) either (A) the transaction or service is of limited scope; or (B) the [full abandonment proceedings are] not needed to protect shippers from the abuse of market power.

49 U.S.C. § 10502 (a)(2000). In practice, exemption proceedings are appropriate if no local traffic has run on the line in at least two years. *See Nat'l Ass'n of Reversionary Prop. Owners ("NARPO") v. STB*, 332 U.S. App. D.C. 325, 158 F.3d 135, 138 n.4 (D.C. Cir. 1998).

law reversionary property interests, if any, take effect. *See Preseault I*, 494 U.S. at 6-8.

The Trails Act, through a process known as "railbanking," provides an alternative to abandoning a railroad right-of-way under sections 10903 and 10502. Section 8(d) of the Trails Act allows a railroad to negotiate with a state, municipality, or private group (the "trail operator") to assume financial and managerial responsibility for operating the railroad right-of-way as a recreational trail.[3]

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[3] Section 8(d), codified at 16 U.S.C. § 1247(d), provides:

(d) Interim use of railroad rights-of-way

The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C. § 801 et seq.], shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal

Id. at 6-7. If the railroad and the trail operator indicate willingness to negotiate a trail use agreement, the STB stays the abandonment process and issues a notice allowing the railroad right-of-way to be "railbanked." 49 C.F.R. § 1121.4. The effect of the notice, if the railroad and prospective trail operator reach an agreement, is that the STB retains jurisdiction for possible future railroad use and the abandonment of the corridor is blocked "even though the conditions for abandonment are otherwise met." *NARPO*, 158 F.3d at 139; *see also Presault I*, 494 U.S. at 8. Specifically, section 8(d) provides that "such interim use [for trails] shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. § 1247(d). Thus, section 8(d) of the Trails Act prevents the operation of state laws that would otherwise come into effect upon abandonment—property laws that would "result in extinguishment of easements for railroad purposes and reversion of rights of way to abutting landowners." *Rail Abandonments-Use of Rights-of-Way as Trails*, Ex Parte No. 274 (Sub-No. 13), 2 I.C.C. 2d 591 (1986). A Fifth Amendment taking occurs if the original easement granted to the railroad under state property law is not broad enough to encompass a recreational trail. *See Preseault II*, 100 F.3d at 1552; *see also Toews*, 376 F.3d at 1376. The statute does not specify in detail what procedures are to be followed under the Act. Pursuant to implementing regulations promulgated by the STB (and developed pursuant

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liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

to notice and comment rulemaking), the typical railbanking process begins when a rail carrier files an abandonment application or, as in this case, a request for an exemption. 49 U.S.C. §§ 10903, 10502; *see also NARPO*, 158 F.3d at 138.

If the STB approves the request for an exemption, it will publish a notice of exemption in the Federal Register. 49 C.F.R. § 1121.4(b) (2004). A potential trail operator may then file a railbanking petition pursuant to 49 C.F.R. § 1152.29(a). Under section 1152.29(a) the petition must include: (1) a map of the right-of-way, (2) a statement indicating that the trail operator will assume financial and legal liability for the right-of-way, and (3) an acknowledgement that the right-of-way may be reactivated for railroad use in the future.[4] If the railbanking petition meets these criteria, and the railroad agrees to negotiate with the petitioner and so communicates to the STB within ten days of

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[4] Specifically the regulation states that:

> The . . . petition must include:
>
> (1) A map depicting, and an accurate description of, the right-of-way . . . proposed to be acquired or used;
> (2) A statement indicating the user's willingness to assume full responsibility: for managing the right-of-way; for any legal liability arising out of the use of the right-of-way . . . and for the payment of all taxes assessed against the right-of-way; and
> (3) An acknowledgement that interim trail use is subject to the user's continuing to meet its responsibilities . . . , and subject to possible future reconstruction and reactivation of the right-of-way for rail service.

49 C.F.R. § 1152.29(a) (2004).

the filing of the trail use petition, the STB will issue a Notice of Interim Trail Use or Abandonment ("NITU"). 49 C.F.R. §§ 1152.29(b)(2) and (d). This NITU permits the railroad to discontinue service, cancel tariffs, and salvage track and other equipment, "consistent with interim trail use and rail banking" without consummating an abandonment and the NITU extends indefinitely to permit interim trail use once an "agreement" is reached between the railroad and the trail operator. 49 C.F.R. § 1152.29(d)(1.

In some cases, such as that of the recreational trail at issue in *Preseault II*, an interim trail use agreement may in fact be reached prior to the issuance of the NITU. 100 F.3d at 1549-50. In other cases, however, such as the present case, the NITU is issued after the trail operator and the railroad indicate their intention to negotiate an agreement but prior to the finalization of an agreement.

Only one NITU is issued once the parties indicate their intent to negotiate for conversion of the corridor to trail use. If negotiations go as planned and an agreement is reached, the NITU extends indefinitely for the duration of recreational trail use subject to the trail operator's fulfillment of its agreed-upon obligations. The STB retains jurisdiction for possible future railroad use, and state law reversionary interests that would normally vest upon abandonment are blocked. *Preseault I*, 494 U.S. at 8. An "escape-clause" is also provided by the NITU such that if no agreement is reached within 180 days, the NITU "automatically converts into an effective . . . notice of abandonment," *id.* at 7 n.5, which permits the rail carrier to "abandon the line entirely and liquidate its interest." *Id.* at 7; *see also* 49 C.F.R. § 1152.29(d)(1). The regulations also allow the parties to request an extension of the negotiating period if more time is

necessary to reach a trail use agreement. 49 C.F.R. § 1152.29(e)(1).[5]

II

On July 5, 1994, the railroad in this case, Norfolk Southern Railway Company ("Norfolk"), filed a request for an exemption under 49 U.S.C. § 10505 (now § 10502) to abandon 7.4 miles of its railroad line located in Columbus, Georgia. Norfolk did not own this right-of-way in fee simple. Rather, Norfolk owned a railroad right-of-way easement that burdened larger parcels over which the line ran. On July 26, 1994, the STB published a notice of abandonment stating that—absent the filing of a petition to stay, *e.g.*, a railbanking petition-the exemption would become effective August 25, 1994. The city of Columbus, Georgia ("the City") filed a railbanking petition and requested issuance of an NITU on August 15, 1994. After receiving notice from Norfolk indicating the rail carrier's willingness to negotiate a trail use agreement with the City, the STB issued an NITU on August 31, 1994. Before the expiration of the 180-day negotiating period, the City and Norfolk filed a "Joint Motion for an extension of the negotiation period provided in the [NITU]" by an additional 180 days. (J.A. at 399.) The City and Norfolk also requested that the NITU be extended to cover an additional 3.2 miles of railroad line adjacent to the 7.4 miles covered by the original NITU.[6] On June 2, 1995, the STB

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[5] "The NITU . . . also provide[s] that, if the user [later] intends to terminate trail use, it must send the Board a copy of the NITU and request that it be vacated on a specific date." 49 C.F.R. § 1152.29(d)(2).

[6] Norfolk had already obtained permission in a separate proceeding to abandon the 3.2 mile segment, but had "not removed

granted both requests. As a result, the proceedings involving the 3.2-mile segment were consolidated with those involving the original 7.4-mile segment, and the NITU negotiating period was extended to August 26, 1995.

On August 17, 1995, Norfolk entered in to a purchase and sale agreement ("the purchase agreement") with the Trust for Public Land ("the TPL"), the entity chosen by the City to negotiate the railbanking arrangement. Under the purchase agreement, Norfolk agreed to sell its railroad line right-of-way easement to the TPL for $1,000,000. Payment of the $1,000,000 (less $500 in earnest money) was to occur at a later date along with transfer of title to the right-of-way. The purchase agreement did not set a closing date, but provided that closing would "occur at a mutually agreeable time and location within three hundred sixty five (365) days." (J.A. at 415.) However, the purchase agreement also gave the TPL the right to terminate the purchase agreement "without liability for damages or for an action for Specific Performance, at any time prior to the Closing Date upon five (5) days written notice to [Norfolk]." (J.A. at 420.)

The purchase agreement was amended on April 18, 1996, to make clear that the conveyance was governed by section 8(d) of the Trails Act. On July 1, 1996, a second amendment

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the tracks or taken any other action to consummate the abandonment." (J.A. at 402.) The decision in this prior proceeding was vacated and the abandonment application for the 3.2 mile segment reopened pursuant to 49 C.F.R. § 1152.29(e)(1), which provides: "If abandonment has not been consummated and the railroad is willing to negotiate, the abandonment proceeding will be reopened, the abandonment decision granting an application, petition for exemption or notice of exemption will be vacated, and an appropriate . . . NITU will be issued."

was made to indicate the TPL's intent to assign its rights under the purchase agreement to the City. The second amendment also required the TPL and Norfolk to cooperate with the City to file a joint motion to further extend the NITU deadline. The following day the TPL assigned its rights under the purchase agreement to the City.

On July 5, 1996, the City informed the STB that a "railbanking agreement" had been reached, but requested that the NITU deadline be further extended "through the time of the actual transfer of the corridor to the interim trail manager, which [was] anticipated to occur on or before November 1, 1996, and to cover any gaps that may have inadvertently occurred in the railbanking negotiation period." (J.A. at 441-42.) On August 6, 1996, the STB granted the City's motion for an extension "to ensure that the NITU remains in effect until actual transfer of the corridor to the interim trail manager," finding the "extension of the NITU negotiating period [to be] warranted" and that "as long as an abandonment has not been consummated and the railroad agrees to negotiate, the Board's jurisdiction is not terminated." (J.A. at 446.) Norfolk transferred its easement for the 10.6 mile railroad line right-of-way by quitclaim deed on October 9, 1996. The deed was recorded on October 11, 1996.

On November 2, 1996, the City filed a "Notification of Railbanking/Interim Trail Use Agreement" to "formally notify the [STB] that, on October 13, 1996, the railroad lines [were] transferred to the City of Columbus as interim trail manager pursuant to an interim trail use/railbanking agreement." (J.A. at 454.) The notification further stated that "as a result of the successful completion of this railbanking/interim trail use transaction, the NITU should

now extend indefinitely." *Id.* This notice was entered into the STB record on November 5, 1996.

III

The appellants, Caldwell, own land that was burdened by the easement Norfolk owned for the 10.6 mile railroad line right-of-way that was the subject of NITU and the railbanking agreement. On October 7, 2002, Caldwell filed a complaint in the Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. § 1491, on behalf of themselves and the class of people who also owned land burdened by the railbanked easement. Caldwell alleged that the government's conversion of the 10.6 mile railroad right-of-way to trail use constituted a compensable taking because the conversion extinguished state law reversionary property interests that would otherwise take effect following the cessation of railroad activities and subsequent abandonment of the easement for railroad use of the right-of-way.

On June 30, 2003, the Court of Federal Claims granted the government's motion to dismiss the complaint because the six-year statute of limitations under 28 U.S.C. § 2501 had run. *Caldwell*, 57 Fed. Cl. at 204. The court rejected Caldwell's argument that its takings claim accrued within the limitations period, when the right-of-way deed was transferred from Norfolk to the City on October 9, 1996. *Id.* at 197-99. The Court of Federal Claims also rejected the government's position that the statute began to run upon issuance of the NITU, concluding that the filing of a claim after the issuance of the NITU but before the identification of "an appropriate public agency to operate the trail" would be premature, relying on language in our *Preseault II* opinion. *Id.* at 200 (citing *Preseault II*, 100 F.3d at 1538). Instead, the Court of Federal Claims held that "the Government taking is

fixed upon the signing of the Trail Use Agreement. At that time the provisions of the NITU become permanent, depriving plaintiffs of their rights in the land in question." *Id.* at 203. Thus, the court held that Caldwell's takings claim had to have accrued prior to July 5, 1996, the date the STB was informed that the purchase agreement had been reached. *Id.* at 203-04. Because Caldwell's claim was not filed until October 7, 2002, more than six years after July 5, 1996, the claim was barred by the statute of limitations. *Id.*

Caldwell filed a motion for reconsideration on July 15, 2003, arguing for the first time that a parallel class action, filed in a Kansas district court under the Little Tucker Act, 28 U.S.C. § 1346(a)(2), tolled the statute of limitations on Caldwell's claim. The Court of Federal Claims denied the motion for reconsideration on August 11, 2003. Caldwell timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review the legal aspects of the determination by the Court of Federal Claims that the appellants' claim was barred by the statute of limitations without deference. *Applegate v. United States*, 25 F.3d 1579, 1581 (Fed. Cir. 1994).

I

The appellants argue that the Court of Federal Claims erred by holding that their claim was barred by the statute of limitations. Specifically, Caldwell urges that a taking under the Trails Act did not occur until the railroad line right-of-way was actually converted into a trail for interim trail use on October 11, 1996. We disagree.

The taking, if any, when a railroad right-of-way is converted to interim trail use under the Trails Act occurs when state law reversionary property interests that would otherwise vest in the adjacent landowners are *blocked from so vesting*. *Preseault II, 100 F.3d at 1552; see* also Toews, 376 F.3d at 1376. The question, then, is in the context of an exemption proceeding, when are state law reversion interests forestalled by operation of section 8(d) of the Trails Act? We conclude that this occurs when the railroad and trail operator communicate to the STB their intention to negotiate a trail use agreement and the agency issues an NITU that operates to preclude abandonment under section 8(d).

In implementing the Trails Act, the STB chose to place the primary responsibility for creating railbanking arrangements on the railroad and trail operator. The Board has stated that in order "to promote and expedite the Trails Act process" it has "declined to burden the Trails Act process, unnecessarily either by rule or adjudication." *Policy Statement on Rails to Trails Conversions*, Ex Parte No. 274 (Sub-No. 13B), slip op. at 4 (I.C.C. Jan. 29, 1990). Indeed, in the STB's view, it "lacks discretion to deny or condition a trails use proposal (other than to ensure that the statutory qualifications are met)." *Id.* at 3. As a result, the NITU is issued only after both the railroad and the trail operator indicate their intent to negotiate a trail use agreement. The process begins when the railroad initiates the abandonment process (either through standard abandonment or exemption procedures). 49 C.F.R. § 1152.29; *see also NARPO*, 158 F.3d at 138. Subsequently, the interested trail operator files a railbanking petition that meets the statutory requirements reiterated in 49 C.F.R. § 1152.29(a). If the railroad agrees to negotiate a trail use agreement and so communicates to the STB, the STB will issue an NITU as a matter of course. 49 C.F.R. § 1152.29(d)(1). Thus, contrary to the view of the

Court of Federal Claims, the NITU is issued only after the trail operator has been identified, and moreover, has indicated its "willingness to assume full financial responsibility and liability for the line and to agree to the railbanking condition for potential future reactivation of rail service." *Policy Statement on Rails to Trails Conversions*, slip op. at 3.

The issuance of the NITU is the only *government* action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right-of-way. The task of finalizing the trail use agreement under the Trails Act falls entirely on the railroad and trail operator. Indeed, the regulations do not even require the railroad and the trail operator to notify the STB that an agreement has been finalized, although a formal request to vacate the NITU is required if the operator intends at some future time to terminate trail use. 49 C.F.R. § 1152.29(d)(2).

After a final trail use agreement is reached, the NITU remains in effect indefinitely and "abandonment cannot be accomplished under the . . . NITU until trail use terminates (without restoration of rail service)." *Policy Statement on Rail Abandonments-Use of Rights of Ways as Trails*, Ex Parte No. 274 (Sub-No. 13), 5 I.C.C. 2d 370, 373 (1989) If, however, "no trail use agreement is reached within 180 days, the . . . NITU converts into a . . . notice of abandonment," *id.*, which "permits the railroad to fully abandon the line." 49 C.F.R. § 1152.29(d)(1); *see also Preseault I*, 494 U.S. at 7 n.5. If no trail use agreement is reached within 180 days, but the railroad wishes to continue negotiations with the trail operator rather than consummate abandonment, the regulations also allow the NITU to be extended, as was done in this case. 49 C.F.R. § 1152.29(e)(1).

Thus, the NITU operates as a single trigger to several possible outcomes. It may, as in this case, trigger a process that results in a permanent taking in the event that a trail use agreement is reached and abandonment of the right-of-way is effectively blocked. *Preseault II*, 100 F.3d at 1552; *see also Toews*, 376 F.3d at 1376. Alternatively, negotiations may fail, and the NITU would then convert into a notice of abandonment. In these circumstances, a temporary taking may have occurred.[7] It is not unusual that the precise nature of the takings claim, whether permanent or temporary, will not be clear at the time it[8] accrues.

Indeed, the Supreme Court has previously contemplated precisely this possibility. In *United States v. Dow*, 357 U.S. 17, 78 S. Ct. 1039, 2 L. Ed. 2d 1109 (1958), the Court also grappled with the issue of fixing the accrual of a takings claim. The question was whether the taking accrued at the time when the initial judgment of "immediate possession" was

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[7] This case does not involve, and we do not herein address, whether the issuance of the NITU in fact involves a compensable temporary taking when no agreement is reached.

[8] *See Seiber v. United States*, 364 F.3d 1356, 1365 (Fed. Cir. 2004) (denial of permit triggers takings claim that, depending on later government action, may be temporary or permanent); *Cooley v. United States*, 324 F.3d, 1297, 1299-300 (Fed. Cir. 2003) (same); *see also Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1347 (Fed. Cir. 2002) ("[T]he initial denial of a permit is still a necessary trigger for a ripe takings claim. . . . If the government denies a permit, then the aggrieved party can seek compensation. If at some point the government reconsiders the earlier denial and grants a permit (or revokes the permitting requirement), then the aggrieved party can seek compensation for a 'temporary regulatory taking'.") (internal footnote omitted).

obtained, or th[illegible] years later, when the government filed a declaration under the Declaration of Taking Act and title formally passed. At issue was respondent Dow's ability to collect compensation from the government, as Dow had purchased the property from the original owner after the government physically occupied the property, but before the formal conveyance of title to the government. Dow had argued that no permanent taking occurred until the filing of the declaration and the formal passage of title, and that only a temporary taking occurred with the government's physical occupation of the land.

The Court held that the taking occurred at the earlier date, when the government entered into physical possession of the land and the owner was deprived of valuable property rights, even though title had not formally passed. *Id.* at 23. The Court rejected, as "bizarre," the argument that there were "two different 'takings' of the same property, with some incidents of the taking determined as of one date and some as of the other." *Id.* at 24. Rather, the Court endorsed a rule similar to the one that we adopt here, namely that a taking occurs when the owner is deprived of use of the property, there by physical possession, here by blocking the easement reversion. While the taking may be abandoned—in *Dow*, by the government's possible surrender of possession prior to the formal passage of title, here by the termination of the NITU-the accrual date of a single taking remains fixed. As the Court observed in *Dow*, the government's decision to abandon the taking "merely results in an alteration in the property interest taken—from full ownership to one of temporary use and occupation." *Id.* at 26.

We therefore hold that the appropriate triggering event for any takings claim under the Trails Act occurs when the NITU is issued. The NITU marks the "finite start" to either

temporary or permanent takings claims by halting abandonment and the vesting of state law reversionary interests when issued. *See*, *e.g.*, *Seiber*, 364 F.3d at 1364.

II

Having determined that the appellants' takings claim accrued on the date when the NITU was issued, we must now determine if the six-year statute of limitations bars Caldwell's claim in this case. We hold that the statute of limitations is a bar here under either of the two potential dates of NITU issuance. The first NITU was issued on August 31, 1994, for the 7.4-mile segment. The scope of the NITU was enlarged to cover the full 10.6 miles on June 2, 1995. Both of these dates are more than six years before the complaint in this case was filed, and therefore Caldwell's claim is barred by the statute of limitations.

III

Appellants further argue that our decision in *Stone Container Corp. v. United States*, 229 F.3d 1345 (Fed. Cir. 2000), would apply to toll the statute of limitations during the eleven-month pendency of a class action in Kansas filed by Cheryl Swisher in October 1998.

We conclude that Caldwell has waived on appeal the argument that the statute of limitations was tolled during the eleven-month pendency of the *Swisher* class action. This issue was first raised below not at trial, but in a motion for reconsideration under Rule 59(a) of the Rules of the Court of Federal Claims. While Caldwell reargues the merits of the tolling argument on appeal, Caldwell did not meet the rigorous standards of RCFC 59(a). Motions for reconsideration must be supported "by a showing of

extraordinary circumstances which justify relief." *Fru-Con Constr. Corp. v. United States*, 44 Fed. Cl. 298, 300 (1999), *aff'd*, 250 F.3d 762 (Fed. Cir. 2000) (table). In particular, Caldwell fails to refute the court's finding that raising the tolling argument for the first time on a Rule 59(a) motion was improper because the pendency of the 1998 Kansas class action was inherently knowable to Caldwell and should have been raised in response to the government's motion to dismiss for lack of jurisdiction. In any event, even with the claimed eleven months of equitable tolling, Caldwell's filing of October 7, 2002, is barred under the six-year statute of limitations, since his claim accrued no later than June 2, 1995.

CONCLUSION

We hold that the Fifth Amendment taking, if any, under the Trails Act is accomplished when an NITU is issued and state law reversionary interests that would otherwise take effect pursuant to normal abandonment proceedings are forestalled. Because Caldwell's claim was filed on October 7, 2002, more than six years after either of the NITUs issued in this case, that claim is barred by the statute of limitations under 28 U.S.C. § 2501. The decision of the Court of Federal Claims dismissing the appellants' claim is

AFFIRMED.

COSTS

No costs.

DISSENT

NEWMAN, Circuit Judge, dissenting.

I respectfully dissent from the court's ruling that the statute of limitations started to accrue from a date before the Caldwell property was "taken" in Fifth Amendment terms. All authority is contrary to this position.

Neither the dates of the Interstate Commerce Commission's authorization to the Norfolk Southern Railroad to abandon railroad use and negotiate transfer of the easement (the ICC's Notices of Intent to Use, whose dates of August 31, 1994 and June 2, 1995 are selected by the panel majority as the dates on which the statute of limitations started to accrue), nor the date the City of Columbus notified the ICC of the intended trail use (the date of July 5, 1996 chosen by the Court of Federal Claims) was an actionable taking of property. Neither event vested a cause of action in the owner of the fee, for neither event was a ripened taking. Neither the federal approval to discontinue railway operations, nor the ongoing negotiation between the railway and the city concerning conversion to trail use, vested a right of compensation by the United States. Thus neither of these events started accrual of the six-year period of limitations of 25 U.S.C. § 2501. *See Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994) ("a claim under the Fifth Amendment accrues when the taking action occurs"); *Steel Improvement & Forge Co. v. United States*, 174 Ct. Cl. 24, 355 F.2d 627, 631 (Ct. Cl. 1966) (same).

A Fifth Amendment taking can indeed flow from a Trails Act conversion of a railway easement. *See Preseault v. United States*, 100 F.3d 1525, 1553 (Fed. Cir. 1996) (*en*

banc). However, these plaintiffs could not have prosecuted their claim until the taking occurred. The taking occurs "when all events have occurred that fix the alleged liability of the Government and entitle the plaintiff to institute an action." *Seldovia Native Association, Inc. v. United States*, 144 F.3d 769, 774 (Fed. Cir. 1998). Until the easement was transferred to the City of Columbus, Norfolk Southern Railroad not only continued as owner of the right-of-way, but retained all of the benefits and obligations of ownership, including the right to exclude, the obligation to pay taxes, and liability for injury and liens. Until the right of trail use was vested in the City the cause of action had not ripened, and liability of the government for compensation was not fixed. Suit at this stage would have simply been premature; the statute of limitations can not start to accrue before suit could have been filed.

Under the Trails Act and its implementing regulations, not only must an "interim trail manager" (the City of Columbus) be approved by the ICC, but the interim trail manager must "assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way." 16 U.S.C. § 1247(d) (1994). These obligations were not incurred until transfer of the deed at the legal Closing; until the Closing, the railroad continued to own the right-of-way, the City of Columbus did not possess and could not occupy the property, and the City could not convert it into a recreational trail. Until these events occurred the owners of the fee were not "clearly and permanently deprived," and the liability of the government to pay compensation was not fixed. *See Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 8 7, 110 S. Ct. 914, 108 L. Ed. 2d 1 (1989) (conversion to trail use may be subject to Tucker Act remedy for Fifth Amendment taking); *Seldovia*, 144 F.3d at 774 ("the key date for accrual purposes

is the date on which Seldovia was clearly and permanently deprived of the lands it had selected").

On October 9, 1996 the Norfolk Southern Railroad conveyed to the City of Columbus the deed for the 10.6 mile right-of-way. I cannot agree that the plaintiffs could have brought earlier suit and obtained compensation for this taking, based on the ICC's authorizations on August 31, 1994 and June 2, 1995 to Norfolk Southern to negotiate a Trails Act conversion. These preliminary events did not fix a ripe takings claim. Negotiation of a possible future event may state a hope and a plan, but it is not a fixed, ripe, and compensable taking. The owners of the fee had no right to compensation based on or at the time of these authorizations to negotiate; thus these authorizations could not accrue the period of limitations.

Nor were the various negotiating documents involving the City of Columbus, starting with the document of August 17, 1995 styled "Purchase Agreement," an actionable taking. This Agreement, from which the City could withdraw on five days' notice, was amended on April 18, 1996 to add the Trails Act's requirement that the manager accept financial and legal responsibility; this acceptance in turn was conditioned on completion of the transaction, and only then would become operable. Thus an Amendment to the Purchase Agreement stated that "at closing Buyer, its successor or assignee, shall assume full responsibility for the management of the right of way, for any legal liability arising out of its transfer or use, and for any payment of taxes in accordance with the requirements of section 8(d)." Another amendment dated July 1, 1996 provided that the City and the railroad would jointly request the ICC (now named the Surface Transportation Board) to extend the time period for negotiation of a "mutually acceptable interim trial use/railbanking agreement"

through and including November 1, 1996. Thus the Agreement itself documented its own negotiating status; these documents could not have formed the basis of a takings action by July 5, 1996, as the Court of Federal Claims held in selecting the date when the City and the railway jointly requested the time extension for further negotiation. This Agreement and its amendments were recordations of the negotiation, not a completed transaction having Fifth Amendment consequences.

Taking claims accrue when the liability of the government is fixed, not simply prospective. In *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573 (Fed. Cir. 1988) the court reiterated that

> for the purposes of section 2501, it would appear more accurate to state that a cause of action against the government has 'first accrued' only when all the events which fix the government's alleged liability have occurred *and* the plaintiff was or should have been aware of their existence.

Id. at 1577. These events occurred when the City acquired the deed and the right to occupy and use the property. The Court explained in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 832, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), that permanent physical occupation occurs "where persons are given a permanent and continuous right to pass to and fro." That did not occur until the Closing, when the deed and the right of occupancy and use were transferred.[1] Before these

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[1] It is not necessary to decide whether the date of accrual of the limitations period was the transfer of the deed at the Closing on October 9, 1996, or its recordation a few days later, or the

events the period of limitations did not start to accrue, for neither the ICC's Notice that permitted negotiation for trail use, nor the various documents implementing those negotiations, ripened a claim for compensation. Intentions are rarely actionable; it is the consummation that accrues legal rights.

The panel majority places great weight on *United States v. Dow*, 357 U.S. 17, 78 S. Ct. 1039, 2 L. Ed. 2d 1109 (1958). In *Dow* the Court held that a taking occurs upon possession and occupancy of the property, and that a subsequent filing under the Declaration of Taking Act did not negate the effect of the earlier possession and occupancy. *Id.* at 22. In *Dow* the government in 1943, by eminent domain, obtained a judgment of "immediate possession" of a right-of-way through a larger tract of land, entered into immediate possession of the right-of-way, and within ten days began laying a pipeline through the tract. In 1945 the owners conveyed the entire tract to Dow, including their right to any compensation for the land taken by eminent domain; and in 1946 the government filed in court a declaration of taking, obtained title to the right-of-way, and deposited estimated compensation with the court. The issue was Dow's rights under the Assignment of Claims Act; there was no issue of the running of a statute of limitations. The Court held that the taking occurred when the United States entered into possession in 1943, when the government "entered and appropriated the property to public use," *id.* at 23, and that the taking neither awaited the later transfer of title to the right-of-way, nor was negated by the later proceeding. The

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Notification from the City of Columbus to the ICC on November 5, 1996, because this suit was filed within six years of the earliest of these dates.

Court stressed that the determinative event of the taking was whether "the Government has already entered into possession." *Id.* at 25. This case well supports the plaintiffs herein.

It is not disputed that the City of Columbus did not possess and occupy the property, and had no authorization or right to do so, until the Closing and transfer of the deed. Although the panel majority relies heavily on *Dow*, the analogy is not apt. In *Dow* the government was in full possession of the property it had obtained by condemnation decree and was actively building the pipeline; thus the Court held that the taking had occurred. In contrast, the authorization from the ICC to the Railway and the City to start to negotiate did not change the possession and occupancy of the easement. My colleagues' view that it is irrelevant when title passes does not mean that the property was earlier taken; that is not the rule of *Dow*. To the contrary, *Dow* strongly reinforces the position that the Norfolk Southern right-of-way was not taken and compensable until there was a transfer of possession and occupancy, an event that did not occur until the date of Closing and the transfer of the deed.

Thus I must, respectfully, dissent from the court's conclusion that the statute of limitations started to accrue when the parties told the ICC that they were negotiating for the purpose of reaching a trail use agreement.

APPENDIX E

STATUTORY AND REGULATORY PROVISIONS INVOLVED

TITLE 16. CONSERVATION
CHAPTER 27. NATIONAL TRAILS SYSTEM
16 U.S.C. § 1247

§ 1247. State and local area recreation and historic trails

* * *

(d) Interim use of railroad rights-of-way.

The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C. § 801 et seq.], shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad

purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 161. UNITED STATES AS PARTY GENERALLY

28 U.S.C. § 2401

§ 2401. Time for commencing action against United States

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

TITLE 49. TRANSPORTATION
SUBTITLE IV. INTERSTATE TRANSPORTATION
PART A. RAIL
CHAPTER 105. JURISDICTION

49 U.S.C. § 10502

§ 10502. Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part –

(1) is not necessary to carry out the transportation policy of section 10101 of this title; and

(2) either–

(A) the transaction or service is of limited scope; or

(B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

(b) The Board may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party. The Board shall, within 90 days after receipt of any such application, determine whether to begin an appropriate proceeding. If the Board decides not to begin a class exemption proceeding, the reasons for the decision shall be published in the Federal Register. Any proceeding begun as a result of an application

under this subsection shall be completed within 9 months after it is begun.

(c) The Board may specify the period of time during which an exemption granted under this section is effective.

(d) The Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title. The Board shall, within 90 days after receipt of a request for revocation under this subsection, determine whether to begin an appropriate proceeding. If the Board decides not to begin a proceeding to revoke a class exemption, the reasons for the decision shall be published in the Federal Register. Any proceeding begun as a result of a request under this subsection shall be completed within 9 months after it is begun.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11706 of this title. Nothing in this subsection or section 11706 of this title shall prevent rail carriers from offering alternative terms nor give the Board the authority to require any specific level of rates or services based upon the provisions of section 11706 of this title.

(f) The Board may exercise its authority under this section to exempt transportation that is provided by a rail carrier as part of a continuous intermodal movement.

(g) The Board may not exercise its authority under this section to relieve a rail carrier of its obligation to protect the interests of employees as required by this part.

TITLE 49. TRANSPORTATION
SUBTITLE IV. INTERSTATE TRANSPORTATION
PART A. RAIL
CHAPTER 109. LICENSING

49 U.S.C. § 10903

§ 10903. Filing and procedure for application to abandon or discontinue

(a)(1) A rail carrier providing transportation subject to the jurisdiction of the Board under this part who intends to–

(A) abandon any part of its railroad lines; or

(B) discontinue the operation of all rail transportation over any part of its railroad lines, must file an application relating thereto with the Board. An abandonment or discontinuance may be carried out only as authorized under this chapter.

(2) When a rail carrier providing transportation subject to the jurisdiction of the Board under this part files an application, the application shall include–

(A) an accurate and understandable summary of the rail carrier's reasons for the proposed abandonment or discontinuance;

(B) a statement indicating that each interested person is entitled to make recommendations to the Board on the future of the rail line; and

(C)(i) a statement that the line is available for subsidy or sale in accordance with section 10904 of this title, (ii) a statement that the rail carrier will promptly provide to each

interested party an estimate of the annual subsidy and minimum purchase price, calculated in accordance with section 10904 of this title, and (iii) the name and business address of the person who is authorized to discuss the subsidy or sale terms for the rail carrier.

(3) The rail carrier shall–

(A) send by certified mail notice of the application to the chief executive officer of each State that would be directly affected by the proposed abandonment or discontinuance;

(B) post a copy of the notice in each terminal and station on each portion of a railroad line proposed to be abandoned or over which all transportation is to be discontinued;

(C) publish a copy of the notice for 3 consecutive weeks in a newspaper of general circulation in each county in which each such portion is located;

(D) mail a copy of the notice, to the extent practicable, to all shippers that have made significant use (as designated by the Board) of the railroad line during the 12 months preceding the filing of the application; and

(E) attach to the application filed with the Board an affidavit certifying the manner in which subparagraphs (A) through (D) of this paragraph have been satisfied, and certifying that subparagraphs (A) through (D) have been satisfied within the most recent 30 days prior to the date the application is filed.

(b) (1) Except as provided in subsection (d), abandonment and discontinuance may occur as provided in section 10904.

(2) The Board shall require as a condition of any abandonment or discontinuance under this section provisions to protect the interests of employees. The provisions shall be at least as beneficial to those interests as the provisions established under sections 11326(a) and 24706(c) of this title.

(c)(1) In this subsection, the term "potentially subject to abandonment" has the meaning given the term in regulations of the Board. The regulations may include standards that vary by region of the United States and by railroad or group of railroads.

(2) Each rail carrier shall maintain a complete diagram of the transportation system operated, directly or indirectly, by the rail carrier. The rail carrier shall submit to the Board and publish amendments to its diagram that are necessary to maintain the accuracy of the diagram. The diagram shall–

(A) include a detailed description of each of its railroad lines potentially subject to abandonment; and

(B) identify each railroad line for which the rail carrier plans to file an application to abandon or discontinue under subsection (a) of this section.

(d) A rail carrier providing transportation subject to the jurisdiction of the Board under this part may–

(1) abandon any part of its railroad lines; or

(2) discontinue the operation of all rail transportation over any part of its railroad lines; only if the Board finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Board shall consider whether the abandonment or

discontinuance will have a serious, adverse impact on rural and community development.

(e) Subject to this section and sections 10904 and 10905 of this title, if the Board–

(1) finds public convenience and necessity, it shall–

(A) approve the application as filed; or

(B) approve the application with modifications and require compliance with conditions that the Board finds are required by public convenience and necessity; or

(2) fails to find public convenience and necessity, it shall deny the application.

TITLE 49. TRANSPORTATION
SUBTITLE IV. INTERSTATE TRANSPORTATION
PART A. RAIL
CHAPTER 109. LICENSING

49 U.S.C. § 10905

§ 10905. Offering abandoned rail properties for sale for public purposes

When the Board approves an application to abandon or discontinue under section 10903 [49 U.S.C. § 10903], the Board shall find whether the rail properties that are involved in the proposed abandonment or discontinuance are appropriate for use for public purposes, including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the Board finds that the rail properties proposed to be abandoned are appropriate for public purposes and not required for continued rail operations, the properties may be sold, leased, exchanged, or otherwise disposed of only under conditions provided in the order of the Board. The conditions may include a prohibition on any such disposal for a period of not more than 180 days after the effective date of the order, unless the properties have first been offered, on reasonable terms, for sale for public purposes.

TITLE 49 -- TRANSPORTATION
SUBTITLE B -- OTHER REGULATIONS RELATING TO TRANSPORTATION
CHAPTER X -- SURFACE TRANSPORTATION BOARD, DEPARTMENT OF TRANSPORTATION
SUBCHAPTER B -- RULES OF PRACTICE
PART 1152 -- ABANDONMENT AND DISCONTINUANCE OF RAIL LINES AND RAIL TRANSPORTATION UNDER 49 U.S.C. 10903
SUBPART C -- PROCEDURES GOVERNING NOTICE, APPLICATIONS, FINANCIAL ASSISTANCE, AND ACQUISITION FOR PUBLIC USE, AND TRAIL USE

49 CFR 1152.29

§ 1152.29 Prospective use of rights-of-way for interim trail use and rail banking.

* * *

(b)(1) In abandonment application proceedings under 49 U.S.C. 10903, interim trail use statements are due within the 45-day protest and comment period following the date the abandonment application is filed. See § 1152.25(c). The applicant carrier's response notifying the Board whether and with whom it intends to negotiate a trail use agreement is due within 15 days after the close of the protest and comment period (i.e., 60 days after the abandonment application is filed).

(i) In every proceeding where a Trails Act request is made, the Board will determine whether the Trails Act is applicable.

(ii) If the Trails Act is not applicable because of failure to comply with § 1152.29(a), or is applicable but the carrier either does not intend to negotiate an agreement, or does not timely notify the Board of its intention to negotiate, a decision on the merits will be issued and no Certificate of Interim Trail Use or Abandonment (CITU) will be issued. If the carrier is willing to negotiate an agreement, and the public convenience and necessity permit abandonment, the Board will issue a CITU.

(2) In exemption proceedings, a petition containing an interim trail use statement is due within 10 days after the date the notice of exemption is published in the Federal Register in the case of a class exemption and within 20 days after publication in the Federal Register of the notice of filing of a petition for exemption in the case of a petition for exemption. When an interim trail use comment(s) or petition(s) is filed in an exemption proceeding, the railroad's reply to the Board (indicating whether and with whom it intends to negotiate an agreement) is due within 10 days after the date a petition requesting interim trail use is filed.

(3) Late-filed trail use statements must be supported by a statement showing good cause for late filing.

* * *

(d) Exempt abandonment proceedings. (1) If continued rail service does not occur under 49 U.S.C. 10904 and § 1152.27 and a railroad agrees to negotiate an interim trail use/rail banking agreement, then the Board will issue a Notice of Interim Trail Use or Abandonment (NITU) to the railroad and to the ~~interim~~ trail user for the portion of the right-of-way to be covered by the agreement. The NITU will: permit the railroad to discontinue service, cancel any applicable tariffs,

and salvage track and materials, consistent with interim trail use and rail banking, as long as it is consistent with any other Board order, 30 days after the date it is issued; and permit the railroad to fully abandon the line if no agreement is reached 180 days after it is issued, subject to appropriate conditions, including labor protection and environmental matters.

(2) The NITU will indicate that interim trail use is subject to future restoration of rail service, and subject to the user continuing to meet the financial obligations for the right-of-way. The NITU will also provide that, if the user intends to terminate trail use, it must send the Board a copy of the NITU and request that it be vacated on a specific date. The Board will reopen the exemption proceeding, vacate the NITU, and issue a decision reinstating the exemption for that portion of the right-of-way. Copies of the decision will be sent to:

(i) The abandonment exemption applicant;

(ii) The owner of the right-of-way; and

(iii) The current trail user.

(3) If an application to construct and operate a rail line over the right-of-way is authorized under 49 U.S.C. 10901 and 49 CFR part 1150, or exempted under 49 U.S.C. 10502, then the NITU will be vacated accordingly.

(e)(1) Where late-filed trail use statements are accepted, the Director (or designee) will telephone the railroad to determine whether abandonment has been consummated and, if not, whether the railroad is willing to negotiate an interim trail use agreement. The railroad shall confirm, in writing, its response, within 5 days. If abandonment has been

consummated, the trail use request will be dismissed. If abandonment has not been consummated but the railroad refuses to negotiate, then trail use will be denied. If abandonment has not been consummated and the railroad is willing to negotiate, the abandonment proceeding will be reopened, the abandonment decision granting an application, petition for exemption or notice of exemption will be vacated, and an appropriate CITU or NITU will be issued. The effective date of the CITU or NITU will be the same date as the vacated decision or notice.

(2) A railroad that receives authority from the Board to abandon a line (in a regulated abandonment proceeding under 49 U.S.C. 10903, or by individual or class exemption issued under 49 U.S.C. 10502) shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line (e.g., discontinued operations, salvaged the track, canceled tariffs, and intends that the property be removed from the interstate rail network). The notice shall provide the name of the STB proceeding and its docket number, a brief description of the line, and a statement that the railroad has consummated, or fully exercised, the abandonment authority on a certain date. The notice shall be filed within 1 year of the service date of the decision permitting the abandonment (assuming that the railroad intends to consummate the abandonment). Notices will be deemed conclusive on the point of consummation if there are no legal or regulatory barriers to consummation (such as outstanding conditions, including Trails Act conditions). If, after 1 year from the date of service of a decision permitting abandonment, consummation has not been effected by the railroad's filing of a notice of consummation, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. In that event, a new proceeding would have to be instituted if the

railroad wants to abandon the line. Copies of the railroad's notice of consummation shall be filed with the Secretary of the Board. In addition, the notice of consummation shall be sent to the State Public Service Commission (or equivalent agency) of every state through which the line passes. If, however, any legal or regulatory barrier to consummation exists at the end of the one-year time period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier. For good cause shown, a railroad may file a request for an extension of time to file a notice so long as it does so sufficiently in advance of the expiration of the deadline for notifying the Board of consummation to allow for timely processing.

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